

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

New York, N.Y.

v.

18 Cr. 0036 (JPO)

DAVID MIDDENDORF and JEFFREY  
WADA,

Defendants.

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March 7, 2019  
9:15 a.m.

Before:

HON. J. PAUL OETKEN,

District Judge,  
and a jury

APPEARANCES

GEOFFREY S. BERMAN

United States Attorney for the  
Southern District of New York

BY: REBECCA G. MERMELSTEIN

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- and -

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APPEARANCES CONTINUED

BROWN RUDNICK LLP  
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BY: STEPHEN COOK  
JUSTIN S. WEDDLE  
SELBIE JASON

- and -

LATHAM & WATKINS  
BY: JASON MASASHI OHTA

- also present -

Lyeson Daniel, Postal Inspector  
Virginia Faughnan, Postal Inspector  
Luke Urbanczyk, Government Paralegal  
Nathaniel Cooney, Government Paralegal  
Kiezia Girard-Lawrence, Postal Inspector  
Stephanie O'Connor, Defendant Middendorf paralegal  
Sarah Chojecki, Defendant Wada paralegal

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1 (Trial resumed; jury not present)

2 THE COURT: Good morning everyone. We are missing one  
3 juror, No. 14, Ms. Melnick, Lauren Melnick.

4 We have another issue. When Mr. Hampton was checking  
5 on whether all the jurors are here, Juror No. 7, Michelle  
6 Lewis, who is the second row, first person on the left, the one  
7 who has been coughing a lot, said a relative had been in an  
8 accident and is in ICU and has a grim prognosis. As a result  
9 of that, she asked if she could be excused tomorrow if  
10 possible. Before inquiring further, I wanted to put that to  
11 the parties and see what you propose to do with that.

12 MS. KRAMER: May we have one moment, your Honor?

13 THE COURT: Yes.

14 MR. BOXER: We have the issue to take up about Ms.  
15 LaStrange at some point today. I don't suggest that happen at  
16 the beginning, but maybe at a break in the afternoon or  
17 something like that. She is the one who said she has to be  
18 done by 5:00.

19 MS. KRAMER: Your Honor, we have no objection to a  
20 general reminder to the jury that they shouldn't feel time  
21 pressure when deliberations begin, but a more specific colloquy  
22 with a single juror we think may call undue attention to this  
23 issue when it is not even clear that she was really raising the  
24 concern that I think needs to be addressed.

25 MR. BOXER: I agree. I don't think a colloquy like

1 that should be done in the presence of the jury. But it seems,  
2 based on her reaction, that it would make sense for the Court  
3 to speak with her individually to make sure she appreciates  
4 that.

5 THE COURT: I need to make clear to all the jurors  
6 that there is no time limit, that they are going to take as  
7 much time as they need to deliberate, there is no deadline of  
8 Friday. That is the main thing. I obviously need to confirm  
9 with her that we may go into tomorrow, so she is going to have  
10 to change her plans, which she said she was willing to do. I  
11 think we are using Friday. We may need Friday for the jury  
12 charge.

13 MR. BOXER: Right. What you just suggested, your  
14 Honors, was fine. It would trigger a concern if she couldn't  
15 deliberate next week, felt like she needed to reach a  
16 conclusion tomorrow. So I think that should be sufficient.

17 THE COURT: What about Juror No. 7?

18 MS. KRAMER: To clarify, your Honor, was she asking to  
19 not return tomorrow or to be excused after tomorrow?

20 THE COURT: It looked like she was asking to be  
21 excused just tomorrow. I haven't talked to her. The  
22 suggestion she gave to Mr. Hampton seemed to be this person  
23 might have a few days to live and she would like to spend some  
24 time with the person, I don't know who it is, tomorrow and  
25 maybe the weekend. It seemed as if she was not saying excuse

1 me from the trial but excuse me just tomorrow.

2 MS. KRAMER: Your Honor, another question. With  
3 respect to No. 14, I believe your Honor said she is not here.  
4 Does your Honor know if she is en route?

5 THE COURT: I don't think we have heard from her. We  
6 assume she is en route.

7 No. 14, Ms. Melnick, is still not there. She hasn't  
8 left a message. When Mr. Hampton calls her, he gets a  
9 voicemail. We assume she is on her way.

10 MS. KRAMER: Your Honor, we are ready to set forth our  
11 position if defense counsel is done conferring. We think we  
12 should wait for No. 14. The jurors have been remarkably on  
13 time every day. We think there is a strong chance that she is  
14 on her way. If we have other potential juror issues, we don't  
15 really want to move forward without No. 14 unless it is  
16 absolutely necessary.

17 With respect to No. 7, we propose proceeding with her  
18 on the jury today and taking it up at the end of the day,  
19 seeing where we are with respect to timing. Perhaps your Honor  
20 can inquire with her at the end of the day about the status of  
21 her relative in the event she has more information, and we can  
22 take it up then.

23 MR. BOXER: That approach is fine, your Honor. Our  
24 inclination is to try to keep her. But waiting to see how it  
25 stands at the end of the day and revisiting it is fine.

1 MR. COOK: Same, your Honor.

2 THE COURT: All right. Just so I know how things are  
3 going to proceed, Ms. Kramer you will be closing for the  
4 government?

5 MS. KRAMER: Yes, your Honor.

6 THE COURT: Mr. Boxer?

7 MR. BOXER: Yes, your Honor.

8 THE COURT: And Mr. Cook?

9 MR. COOK: Yes.

10 THE COURT: I received a letter from counsel for Mr.  
11 Wada last night regarding the exhibit. I assume you are all  
12 aware of the renumbering that occurred.

13 MR. WEDDLE: Your Honor, while we are all here, I  
14 wanted to preserve our request which your Honor did not include  
15 in the charge. I assume all that was deliberate and your Honor  
16 had heard us and ruled on it. The one in particular I wanted  
17 to flag, because I am a bit of an unrealistic optimist, is  
18 multiple conspiracies in the off chance your Honor meant to put  
19 it in and didn't.

20 THE COURT: I thought about it and concluded that it  
21 was not necessary or appropriate. But I understand your  
22 argument.

23 MR. WEDDLE: Thank you.

24 MR. BOXER: Our objection is preserved as well, your  
25 Honor.

1 THE COURT: Yes.

2 MR. BOXER: I was reminded of a matter, if we could  
3 approach briefly, since we have some free time.

4 (At the sidebar)

5 MR. BOXER: During Mr. Hanson's testimony it became  
6 apparent that two submissions were filed ex parte under seal.  
7 We were the party ex those filings. I would ask that they be  
8 produced to us, remaining under seal. I obviously can't argue  
9 the basis for why it needed to be submitted ex parte. We have  
10 had a lot of filings under seal. Perhaps there is a very good  
11 reason, but not knowing what one might be, I would make that  
12 request.

13 THE COURT: Any objection?

14 MS. MERMELSTEIN: Yes, your Honor. For the very  
15 reason that it was filed ex parte, without going into the  
16 content, as I think it was probably clear, it relates to  
17 impeachment material for a witness defense called. They are  
18 not entitled to that information for any purpose. Given the  
19 reasons why it was filed under seal in the first instance,  
20 which was not just to avoid the government's position on that  
21 topic but in light of the nature of that information, I don't  
22 see any reason for it to be disclosed. Even more so given that  
23 it didn't come up.

24 MR. BOXER: That's a little self-defining.

25 THE COURT: I'll think about it. I'm not sure what

1 the relevant law on that is.

2 MR. BOXER: That's fine. I appreciate the case is  
3 closed. Our client has been asking me about it, and I don't  
4 really have a good answer as to why we don't have it. That is  
5 the application.

6 MS. MERMELSTEIN: I would just note that I assume that  
7 the other ex parte filing came from Mr. Hanson's counsel.

8 THE COURT: Yes.

9 MS. MERMELSTEIN: I think he ought to be permitted to  
10 be heard before his sealed filing becomes public. And since  
11 they relate to the same thing, it's one inquiry, I think.

12 MR. BOXER: You don't have his filing?

13 MS. MERMELSTEIN: No.

14 MR. BOXER: So my application only relates to the  
15 government's filing.

16 THE COURT: I can say it relates to the terms of Mr.  
17 Hanson's separation from the PCAOB. Beyond that, I don't think  
18 I can go into it. If it was a proper ex parte filing, which I  
19 think it was, it was just impeachment material relating to that  
20 witness that didn't come up.

21 MR. BOXER: Understood. I appreciate that.

22 THE COURT: I'll think about it and look into the law  
23 whether it is appropriate to disclose it.

24 MR. BOXER: Even the extra detail of this morning is  
25 helpful.



1 MR. WEDDLE: In a number of our letters we put in a  
2 request that they needn't be sealed. We have a general  
3 position that 3500 material didn't need to be sealed. I wanted  
4 to flag that that application is outstanding. I think there  
5 are probably five letters under seal where we said that.

6 THE COURT: That was on the record?

7 MR. WEDDLE: It is only in the letter itself. There  
8 is nothing on the record. When we filed some sealed letters,  
9 we filed them under seal out of respect for the fact that prior  
10 letters had been sealed and we were referring to 3500 material.  
11 We put a footnote saying although we are filing it under seal,  
12 we don't think it needs to be filed under seal.

13 THE COURT: What is the date of that letter?

14 MR. WEDDLE: I can look them up. It's several  
15 letters.

16 THE COURT: That's from during the trial?

17 MR. WEDDLE: During the trial.

18 THE COURT: Okay.

19 (In open court)

20 THE COURT: All the jurors are here. Ready to begin?

21 MS. KRAMER: Yes, your Honor.

22 THE COURT: We'll bring them out.

23 (Jury present)

24 THE COURT: Good morning, ladies and gentlemen.

25 Welcome back.

1           You have heard all the evidence in this case, ladies  
2 and gentlemen of the jury. The next stage is for counsel for  
3 each of the parties to have a chance to give you summations, or  
4 closing arguments. As I said before, when the lawyers are  
5 talking, it is not evidence in the case. You have heard and  
6 seen all the evidence in the case and you will have a chance to  
7 see it when you are in the jury room deliberating.

8           However, an important part of the trial is that the  
9 lawyers for each of the parties get a chance to talk about the  
10 evidence, to tell you how they think you should interpret the  
11 evidence and connect the evidence. That is what a closing  
12 argument is.

13           You may hear different views of the evidence,  
14 different interpretations of the evidence from the parties. It  
15 is ultimately for you, the jury, the fact-finder in the case,  
16 to find what the facts are. I'll be explaining that in my jury  
17 instructions to you afterward.

18           We will begin with the summation, or closing argument,  
19 of counsel for the government.

20           Ms. Kramer.

21           MS. KRAMER: Thank you, your Honor.

22           Good morning, ladies and gentlemen.

23           THE JURY: Good morning.

24           MS. KRAMER: For accounting firms like KPMG, almost  
25 nothing is more important than inspection results. For David

1 Middendorf, one of the top executives in the entire  
2 corporation, there was nothing more important. KPMG's  
3 inspection results had been terrible. Improving them was his  
4 number one prior to. It was literally his job.

5         Against that backdrop, in the spring of 2015 this  
6 fraudulent scheme was born. David Middendorf, the defendant,  
7 was at the heart of it. He made a decision, a decision to  
8 cheat, to improve the inspection results, to corrupt the  
9 process that should have been done with truthfulness and  
10 integrity. That is exactly what he and his partners in crime  
11 did, year after year after year, until they got caught.

12         What happened when Brian Sweet started at KPMG in May  
13 2015? Right away Middendorf and his underlings started pumping  
14 Sweet for confidential PCAOB inspection information. Day one:  
15 confirm these picks that we suspect. Day two: remember where  
16 your paycheck comes from, add value wherever you can, share  
17 what you know even in the gray areas. Day four: send me the  
18 list.

19         By the end of Sweet's first week at KPMG, Middendorf  
20 and his subordinate Tom Whittle had asked for and received the  
21 entire confidential PCAOB inspection list for 2015. That was  
22 the birth of the scheme perpetrated by Middendorf and his  
23 subordinates Tom Whittle, David Britt, Brian Sweet, and Cindy  
24 Holder.

25         For it to keep going, for the scheme to keep going,

1 they would need fresh information, fresh confidential  
2 information, a corrupt insider. That's where Jeff Wada, the  
3 defendant, came in. He jumped into this fraudulent scheme head  
4 first. Why? To help himself. Wada was playing the long game.  
5 He wanted to be a partner at KPMG one day, so he was putting  
6 good will in the bank for a big payday later.

7 By the fall of 2015 Wada was a full-fledged member of  
8 this conspiracy, passing confidential PCAOB inspection  
9 information to KPMG, as he would again and again in 2016 and  
10 2017.

11 Why did they secretly use the stolen confidential  
12 information? After sitting through this trial, ladies and  
13 gentlemen, you all know the answer: to falsely inflate KPMG's  
14 inspection results, to serve their own interests, to make KPMG  
15 and themselves look better in the eyes of potential clients, in  
16 the eyes of the PCAOB, and in the eyes of the SEC.

17 This was fraud plain and simple, ladies and gentlemen,  
18 and that's why we are here today.

19 This closing argument is our opportunity to walk you  
20 through the key evidence that you have heard and seen over the  
21 last almost four weeks of this trial, to show you how all of  
22 the evidence proves that the defendants are guilty as charged.  
23 And, ladies and gentlemen, the evidence in this case is  
24 overwhelming.

25 Before I get to all the proof, all the evidence that

1 you have seen for this trial, I want to take a moment to talk  
2 about the charges. Judge Oetken is going to give you detailed  
3 instructions on the law when the case is over. In talking  
4 about the crimes charged in the case, it is my hope to give you  
5 a roadmap, a roadmap about what is in dispute and how the  
6 evidence fits together to show that the defendants are guilty  
7 beyond any reasonable doubt.

8           There are three counts of wire fraud. They are known  
9 as substantive counts. One count charges just Middendorf for  
10 the 2015 list, one count charges Middendorf and Wada for 2016,  
11 and one count charges Middendorf and Wada for 2017. There is  
12 also a conspiracy count charging both defendants with  
13 conspiring to commit wire fraud.

14           I'll be speaking more about this, but the essence of  
15 wire fraud, the essence of the wire fraud charges in this case,  
16 is that Middendorf and Wada defrauded the PCAOB by stealing and  
17 using confidential and valuable property from the PCAOB, their  
18 closely guarded inspection lists, confidential information that  
19 Wada was entrusted with, confidential information he had a duty  
20 not to disclose. It was a crime for Wada to breach that duty  
21 and it was a crime for everyone else who helped him do it.

22           How do you know they committed wire fraud, ladies and  
23 gentlemen? With each inspection list, you have seen the  
24 scheming, the deception, the lies to get their hands on the  
25 PCAOB's most valuable confidential information: the names and

1 other details about KPMG's audits that the PCAOB, a regulator,  
2 was going to inspect, inside information that KPMG wasn't  
3 supposed to have, that the PCAOB deliberately held back so that  
4 their inspections actually worked, so that their inspections  
5 actually gave insight into how KPMG was doing on its audits,  
6 how it was doing when no one was looking, how it was doing when  
7 it didn't know that those would be inspected.

8           You have seen the devious plots to exploit that  
9 information within the circle of trust and the stealth  
10 re-reviews to change the inspection results, to get better  
11 results than they otherwise would have gotten, to cheat. All  
12 of that shows you there was a scheme to defraud.

13           And you know that the defendants knew exactly what  
14 they were doing when they played their parts in these crimes.  
15 Middendorf was the boss. He called the shots. Everybody at  
16 KPMG in the circle of trust reported to him. He sought out the  
17 confidential PCAOB information. He applied the pressure. He  
18 helped craft the devious plan to use the stolen information.  
19 He knew the purpose of the scheme. He knew it was wrong.

20           Wada, of course, knew full well that he couldn't take  
21 the PCAOB's most confidential information and share it, that  
22 doing so was a breach of his duty to the PCAOB. It was  
23 confidential information he was entrusted with and obligated to  
24 protect.

25           There is no doubt that these two men fully intended to

1 participate in these schemes and knew that what they were doing  
2 was wrong. They were lying and cheating and stealing for  
3 years, and those things have never been right.

4 As I mentioned, both defendants are also charged with  
5 conspiring or agreeing to commit wire fraud. That's Count Two.  
6 That illegal agreement, that's a separate crime from the actual  
7 wire fraud counts. This conspiracy began in the spring of  
8 2015, and it kept on going through February 2017, when the  
9 whistle-blowers found out and put an end to it.

10 Finally, the defendants are both charged with  
11 conspiring, or agreeing, to defraud the Securities and Exchange  
12 Commission, the SEC, in the same time period. That's Count  
13 One. This crime is different from the wire fraud charges. It  
14 isn't about stealing property from the SEC. It's about the  
15 defendants' scheming to interfere with the SEC's ability to  
16 regulate auditors and enforce their rules against KPMG and  
17 other accountants, the gatekeepers of the financial markets.

18 Middendorf and the other members of this conspiracy  
19 wanted better inspection results for a reason, ladies and  
20 gentlemen. They wanted to deceive not just the PCAOB but also  
21 the SEC. They wanted the SEC to think that KPMG had cleaned up  
22 its act. The SEC, KPMG's main government regulator, was  
23 calling KPMG out for its poor work, for its poor inspection  
24 results. Cheating on those inspections with this stolen  
25 confidential information, that was a way of tricking the SEC

1 and getting the agency off its back. That's fraud.

2 Because several of the charges in the case involve  
3 wire fraud, I am going to start by walking you through the  
4 evidence of the scheme to defraud. I'll talk to you later  
5 about conspiracy to interfere with the work of the SEC, but  
6 let's start with the scheme to defraud the PCAOB, and let's get  
7 to it with the first inspection list in 2015, Count One.

8 To understand why this list was gold, why the  
9 inspection results mattered so very much, why Middendorf was  
10 willing to cross that criminal line, we have to look for a  
11 minute at what was happening before the scheme started. KPMG's  
12 performance on PCAOB inspection results was terrible, terrible.  
13 Middendorf and other KPMG leaders got dressed down at a meeting  
14 with the head of the PCAOB's inspections division. Tom  
15 Whittle, then head of inspections, called it a punch in the gut  
16 by the PCAOB. Why? You heard exactly why. The PCAOB was very  
17 critical of KPMG's high failure rates in the allowance for loan  
18 loss area. That was a hot topic for them.

19 High failure rates, ladies and gentlemen, that means  
20 lots of comments, comments on that area of concern, the ALL,  
21 comments that Middendorf and the rest of KPMG wanted to avoid.  
22 Why? Because KPMG was doing really badly. For the inspections  
23 conducted in 2014, 28 out of 51 had failed. That's a 55  
24 percent failure rate. Even if that's a grade of the quality  
25 only of KPMG's work on the riskiest audits, it's terrible.



1 It's a terrible outcome.

2 What did that mean to the firm at the time? Tom  
3 Whittle told you. These results were poor, poor relative to  
4 our historic inspections and poor relative to our peer group,  
5 the other Big Four accounting firms.

6 These lousy results didn't exist in a vacuum. They  
7 were used by the PCAOB and the SEC. They were looked at by  
8 clients and they were big news in the business world. They  
9 were reported on in The Wall Street Journal.

10 So, what happened when Brian Sweet started at KPMG in  
11 May 2015, after he had already taken confidential PCAOB  
12 documents when he left for KPMG? From day one, from day one,  
13 Middendorf pumped him for information. Over lunch Middendorf  
14 asked Sweet about inspections and got increasingly more  
15 pointed. Middendorf asked Sweet to confirm inspections that  
16 Middendorf already suspected based on the PCAOB's plan  
17 schedule. Is it going to be Stonegate Mortgage? Is the PCAOB  
18 going to inspect Wells Fargo?

19 When Sweet confirmed Wells Fargo, Middendorf let Sweet  
20 know just how happy he was to get that confidential  
21 information. He got animated. He slapped the table. He said  
22 "I knew it." Middendorf wanted inside information, and that's  
23 what he got that day. He had a taste of it, and he wanted  
24 Sweet to keep it coming.

25 Now I want to talk about what Dave Middendorf said

1 when he took that stand and testified in this trial. But  
2 before I do, I want to remind you of what you have already  
3 heard and you will hear again: that of course a defendant has  
4 absolutely no burden whatsoever. He can absolutely choose not  
5 to testify. Doesn't even have to put on a case or have a  
6 lawyer give an opening statement. That burden rests with the  
7 government at all times, and it is a burden that we embrace.

8 But when a defendant does testify or put on any kind  
9 of case or make an argument, you should scrutinize what is  
10 said. You should take a close look at it, look carefully,  
11 think about whether what you heard makes sense, whether it adds  
12 up. In this case it most certainly does not.

13 When asked about this during his testimony, what did  
14 Middendorf say about asking Sweet to confirm Wells Fargo? "I  
15 don't recall." Come on, ladies and gentlemen. If you believe  
16 Middendorf, he remembered specific words that a PCAOB board  
17 member said to him over a lunch at an airport years ago. He  
18 remembered those words when they helped him, but he doesn't  
19 remember this? It doesn't add up.

20 On Sweet's first day, Middendorf wanted inside  
21 information, and he made that crystal clear to Sweet. And  
22 because Middendorf was the boss, that information kept flowing.  
23 On Sweet's second day he had what was supposed to be a welcome  
24 meeting with Middendorf and Jim Liddy, then vice chair of  
25 audit, Middendorf's boss. Liddy participated by phone. After

1 he hung up, it was just Sweet and Middendorf alone in an  
2 executive conference room at KPMG.

3 Day two, Middendorf made his intent plain. He told  
4 Sweet, add value, share insights wherever possible, even in the  
5 gray areas, like Stonegate. He was talking about Stonegate  
6 Mortgage, ladies and gentlemen, one of the audits on the 2015  
7 list that the day before, at the first day lunch, Middendorf  
8 asked Sweet to confirm. Share insights even on things like  
9 Stonegate, even when it means telling us who the PCAOB is going  
10 to inspect, even when that is closely held, confidential  
11 information.

12 What else did he say? "Remember where your paycheck  
13 comes from." What was he saying there? What does that mean?  
14 Tell me what you are not supposed to, give up the confidential  
15 information, earn that paycheck. I'm your boss and I'm telling  
16 you this is literally part of your job. Remember where your  
17 paycheck comes from.

18 Just two days later Sweet had lunch with Tom Whittle.  
19 After the lunch they talked about an inspection list that Sweet  
20 had taken with him from the PCAOB. Whittle wanted to get that  
21 list, but he checked with Middendorf first. He told you that  
22 he told Middendorf that Sweet had a list of banking  
23 inspections, the PCAOB's planned inspections of KPMG banking  
24 clients, most of which were still confidential. What did  
25 Middendorf say? Go ahead and get that list. Get that list,

1 ladies and gentlemen.

2 This illegal heads-up, this advance notice, could give  
3 them extra time to get ready for the inspections they knew  
4 would get picked, an opportunity, a criminal opportunity, to  
5 turn around their bad results.

6 At Middendorf's direction Whittle emailed Sweet and  
7 asked for the list. "Send me the banking selection list."  
8 That's Government Exhibit 735. And Sweet delivered with the  
9 full list, the full list for 2015. Sweet had the list sent to  
10 Whittle and told him it is actually the full list of  
11 anticipated inspections, anticipated, not yet announced by the  
12 PCAOB, highly confidential. Sweet told Whittle, I appreciate  
13 the team's discretion to make sure it isn't too widely  
14 disseminated. This was confidential, and Sweet made that  
15 crystal clear.

16 Let's look at what Whittle did next. Whittle sent the  
17 list to Middendorf. What did he say? "The complete list,  
18 obviously very sensitive. We will not be broadcasting this."  
19 That is Government Exhibit 754. You can look at it as you  
20 deliberate. You will have all of the exhibits with you in the  
21 jury room.

22 This is cold, hard proof that Middendorf got a  
23 confidential PCAOB inspection list in 2015. And the language  
24 of this email, ladies and gentlemen, tells you this was no  
25 surprise. This wasn't news to him. This was something he

1 expected, something he had asked for.

2           How does the email start? An introduction? No. Does  
3 it say, Dave, guess what, you won't believe it, Brian Sweet has  
4 a list, a list of confidential selections? There is no lead-in  
5 at all, because there doesn't have to be. The way this email  
6 is written tells you everything you need to know about the fact  
7 that Middendorf had told Whittle get that list and was  
8 expecting it.

9           Whittle didn't need to see more. He didn't need to  
10 tell his boss what this was about. That's why it doesn't say  
11 "big news." That's why there is no introduction whatsoever.  
12 He didn't need to say any of that because Middendorf had  
13 already talked to Whittle, had already learned about the list,  
14 had already directed Whittle get that list. That direction,  
15 having Sweet disclose confidential information he was bound not  
16 to share, that was fraud.

17           What did Whittle say? "The complete list," a  
18 reference of course to the list that Middendorf had asked for,  
19 obviously very sensitive, "we will not be broadcasting this."  
20 "Obviously," he said. This wasn't a close call. This wasn't a  
21 gray area. The inspection list was the most confidential  
22 information, and that was plain as day to Middendorf, who  
23 received this email.

24           Dave Middendorf has decades of experience. You heard  
25 him talk about that. He was one of KPMG's top executives, the

1 head of their national office. His very job was dealing with  
2 the PCAOB and the SEC. He got this confidential list, the  
3 complete list, by email.

4 What did he say about it? You know what he said,  
5 ladies and gentlemen. "I don't recall." That was his answer  
6 to the most devastating proof in the case. But it doesn't add  
7 up. This was no average email. Look at the cryptic language.  
8 Look at the attachments. Look at the subject line from Brian  
9 Sweet on the Friday of Sweet's first week. This would turn the  
10 heads of anyone who got this email. He didn't write back and  
11 say what are you talking about, I have no idea what this means,  
12 because he knew exactly what it meant and he had asked for it.

13 Why did he claim a failure of memory about this?  
14 Because he has to. He knows this email and his role in asking  
15 for it and receiving it and using it puts the lie to the claim  
16 that he didn't know that what he did was wrong. Remember, both  
17 Tom Whittle and Brian Sweet, two people who worked for  
18 Middendorf, two people who participated with Middendorf in this  
19 criminal scheme for years, they each pled guilty, admitted that  
20 they knew what they were doing was wrong every step of the way,  
21 admitted how this whole scheme was designed to defraud the  
22 PCAOB and the SEC.

23 Before I go further in walking you through how they  
24 used this confidential stolen information, I want to talk for a  
25 minute about the fact that the lists are at the heart of the

1 wire fraud charges. I anticipate that Judge Oetken will  
2 instruct you that a wire fraud scheme has to target money or  
3 property.

4 So, what constitutes property for purposes of wire  
5 fraud? I expect that Judge Oetken will instruct you that the  
6 definition of property for these purposes includes an  
7 organization's or entity's confidential information that is of  
8 value to that organization or entity.

9 The confidential PCAOB inspection lists that are the  
10 heart of this case fit that definition to a T. They are highly  
11 confidential. You have seen that again and again. You  
12 remember what Barbara Hannigan, the PCAOB's chief ethics  
13 officer said about this. When asked whether there is a  
14 black-and-white answer to whether you can leak inspection  
15 lists, that has the most black-and-white answer you could have.  
16 That is such highly sensitive information. It is clear that  
17 you cannot leak that list.

18 That is because the PCAOB's ethics code, that rule you  
19 have heard about so many times called EC9, that imposes a  
20 lifetime ban -- while you work for the PCAOB, after you leave  
21 the PCAOB -- a lifetime ban on sharing confidential PCAOB  
22 information. Sharing inspection lists, Barbara Hannigan told  
23 you, is a violation of EC9. Middendorff wants you to believe  
24 that this is some gray area. Literally no one, no one, who  
25 testified in this trial agrees with him.

1           These inspection lists aren't just confidential. They  
2           are extremely valuable to the PCAOB. They are at the heart of  
3           what the PCAOB does. In terms of resources, it takes months of  
4           analysis to decide which 50 or so of KPMG's approximately 700  
5           public company audits it is going to inspect. Dozens of people  
6           work on this effort at a cost of hundreds of thousands of  
7           dollars per year. For 2015 alone it cost the PCAOB almost  
8           \$400,000 to come up with the inspection list, and that is just  
9           2015.

10           As you consider each of the other wire fraud charges,  
11           remember there was also the cost for planning in 2016 and then  
12           the cost for replacing those inspections, for figuring out what  
13           new picks to make after this scheme was uncovered. There is  
14           the cost for planning a whole 2017 list and replanning it after  
15           the scheme came to light. This information was extremely  
16           valuable.

17           You know that the PCAOB inspection lists constitute  
18           property for the wire fraud statute. They are highly  
19           confidential and highly valuable to the PCAOB. So, going back  
20           to 2015, after Middendorff gets the confidential inspection list  
21           that Whittle forwards to him that came from Brian Sweet, what  
22           do they do? They used it. They exploited it. They acted on  
23           it to try to improve KPMG's inspection results, another step in  
24           their fraudulent scheme.

25           Whittle told you that he compared the engagements on



1 the stolen list with the planned internal inspections, those  
2 inspections that KPMG did within its own staff. He did an  
3 analysis to see if they should change the firm's planned  
4 internal inspections to avoid comments.

5 But that's not all they did with the stolen  
6 information. Sweet told three different KPMG partners whose  
7 audits had already been notified by the PCAOB the highly  
8 sensitive and confidential rationale for selection, the reasons  
9 that the PCAOB picked those audits for inspection. You heard  
10 testimony from several witnesses that that rationale is never  
11 shared with accounting firms. It's highly confidential.

12 And Sweet did not do this in a vacuum, ladies and  
13 gentlemen. Tom Whittle testified that he discussed this with  
14 David Middendorf. Sweet told Whittle, Whittle told Middendorf.  
15 Middendorf knew exactly what Sweet was doing: that they were  
16 putting the stolen list to use. Middendorf knew in Sweet's  
17 very first week that the 2015 list was being put to criminal  
18 use.

19 What could be done with the 2015 list when the audits  
20 were done and the workpapers were already locked down after  
21 that 45-day documentation period you have heard a lot about?  
22 What could be done? Plenty. Plenty. Certainly enough to make  
23 a difference in the inspection results to avoid a dreaded  
24 comment.

25 Why would they even try, ladies and gentlemen? It

1 makes no sense. You heard that the time and effort to prepare  
2 for the opening meeting, that first part of a PCAOB inspection,  
3 that three- or four-hour opening meeting could make all the  
4 difference in whether a comment is issued. You heard this from  
5 several witnesses.

6 Brian Sweet told you that it has a significant impact  
7 on the overall inspection results. Whittle, the former head of  
8 inspections, told you that when the engagement team was  
9 confident and showed that they had control over the audit, the  
10 inspection went better. What does an inspection going better  
11 mean, ladies and gentlemen? There's only one thing: comments  
12 or no comments. An inspection going better means fewer  
13 comments. Stephanie Rodriguez, the KPMG U.S. team lead at the  
14 PCAOB also told you that the opening meeting makes a difference  
15 in the outcome of the inspection.

16 So Middendorf and the others did everything they could  
17 to get the greatest advantage from that stolen list even though  
18 they got it late in the season. They put extra resources on  
19 Wells Fargo. "Because we had confirmed that it was in fact  
20 going to be inspected, we moved that preparation time up  
21 several weeks or months before." Whittle told you the only  
22 reason they did that was because Sweet had confirmed that Wells  
23 Fargo was on the list.

24 Make no mistake, Whittle did not do this alone.

25 "Q. Who, if anyone, at KPMG did you discuss the fact with that

these additional resources were being assigned to Wells Fargo?

"A. With David Middendorf,"

Whittle told you. It was signed off on by Dave Middendorf, the boss, another way you know that Middendorf tried to exploit and use this confidential information. So, for 2015 you have seen overwhelming evidence of a scheme to defraud.

And you know that Middendorf knew that these confidential PCAOB inspection lists were provided by corrupt insiders against PCAOB rules. He admitted as much. When pressed on cross-examination he said he told you that he understood that getting a confidential list in 2015 would be wrong. And for all the lists that he didn't claim to forget, he admitted on cross-examination to knowing that they came from a corrupt insider at the PCAOB.

And he knew about the PCAOB's confidentiality rules. He said on cross that he knew when Sweet was hired that there was information that he wasn't allowed to share, that there were restrictions on what he could say. You have seen overwhelming evidence that Middendorf knew full well that what he was doing was wrong. And that is on top of some fundamental information you have about him, about his smarts, his experience, his sophistication. That makes crystal clear that getting a stolen inspection list from their regulator was flat-out wrong.

1           You know that Middendorf was right in the middle of  
2     the scheme to defraud the PCAOB out of its valuable property.  
3     That breach, that fraud, it was material. That just means that  
4     it has to matter to an ordinary person in the PCAOB's position.  
5     You already know from several PCAOB witnesses that it mattered  
6     an enormous amount. This was the most highly sensitive  
7     information.

8           In fact, it mattered so much that the PCAOB spent  
9     enormous resources doing reinspections, picking new targets  
10    when it found out that its list had been stolen, when it found  
11    out about this scheme. Of course this mattered. Of course the  
12    confidentiality of the information, the surprise aspect of the  
13    inspections, not getting notice until just before, that all  
14    mattered to the PCAOB. Of course it was material.

15          Finally on the wire fraud counts, the last thing the  
16    government has to prove is that some sort of interstate wire  
17    was used in furtherance of the scheme. I expect that Judge  
18    Oetken will tell you that that can be any sort of electronic  
19    signal that goes across state lines, like an email or phone a  
20    call or a text message.

21          You know that interstate wires were used in this  
22    scheme. Ken Koch, a KPMG partner, explained that every email  
23    sent or received from a KPMG email address in 2015, 2016, and  
24    2017, the time period of the crimes before you, those emails  
25    traveled through servers in New Jersey. So even when

1 participants in these crimes were sitting in their New York  
2 office on Park Avenue emailing each other from Manhattan to  
3 Manhattan, every single one of those emails passed through New  
4 Jersey. That's an interstate wire.

5 You also have more because you know that Jeff Wada  
6 lived in California, Cindy Holder lived in Houston, and the New  
7 York office of KPMG is right here. All of the text messages,  
8 all of the emails, the voicemails you have seen, the emails  
9 asking for the list, the email delivering the list, on an and  
10 on, those all are interstate wires.

11 That's Count Three, ladies and gentlemen, done. Dave  
12 Middendorf is guilty of Count Three.

13 Was their ultimate goal successful in 2015? Did they  
14 make a difference to KPMG's inspection results? Not as much as  
15 could have happened, because they didn't get the stolen list  
16 quite early enough in 2015 to do that much. KPMG's performance  
17 on the 2015 inspections was still bad. 20 out of 49  
18 inspections were failures.

19 Let me pause for a just a minute. The fact that they  
20 didn't make a huge difference in the inspection results in  
21 2015, that does not matter to your determination of the  
22 defendant's guilt. You don't need to find that the stolen list  
23 actually impacted the inspection results.

24 For 2015 Middendorf was guilty when he told Whittle to  
25 get that list, when Whittle sent the email asking for it, and

1 when Sweet sent it so that they could use it. This was  
2 valuable confidential information that Middendorff knew Sweet  
3 was not allowed to share, was bound not to share. So, whether  
4 or not their inspection results actually improved with the  
5 stolen list doesn't make him any less guilty, not one bit.

6 By the fall of 2015, Holder had come over to KPMG from  
7 the PCAOB and was regularly reaching out to Jeff Wada to get  
8 confidential information to pass to Sweet and his bosses,  
9 including Middendorff, so that it could be used, all to satisfy  
10 that ongoing request that started Sweet's first week. This was  
11 when Wada joins the conspiracy. Let's spend a couple of  
12 minutes talking about Jeff Wada and how he joined these crimes.

13 Because of his position at the PCAOB and his work on a  
14 KPMG Japan inspection, he was entrusted with access to the KPMG  
15 part of the PCAOB's computer system. Again and again he  
16 violated that trust. He took confidential information that  
17 wasn't his to share, and he passed it to KPMG so that it could  
18 be used, something he knew full well he wasn't allowed to do.

19 I am going to walk you through one of the examples of  
20 Wada doing this, passing confidential information to KPMG in  
21 2015. But before I do that, I want to pause and go over the  
22 crushing evidence that Wada knew that he was not allowed to do  
23 this. There is so much of it. Let's just take a look at a  
24 couple of the things you have seen in this case.

25 First, you know that Wada was bound by the ethics code

1 EC9, which you have heard a lot about. That is the rule that  
2 prevents PCAOB employees from sharing confidential PCAOB  
3 information. EC9, which you have seen a lot of, is on the left  
4 on this slide. It's Government Exhibit 20.

5 Look at Wada's PCAOB ethics certification. Year after  
6 year you can see at the bottom of Government Exhibit 24 --  
7 2008, 2009, 2010, and on through 2016 -- he certified that he  
8 was in compliance with the PCAOB ethics code, that he knew the  
9 rules, that he knew he could not disclose nonpublic  
10 information, confidential information. He knew the rules. He  
11 lied and said he was following them.

12 The notion that he couldn't possibly know that it was  
13 wrong to disclose this confidential information -- the  
14 inspection list, the most confidential of all of PCAOB's  
15 information -- is preposterous. Why else would he use coded  
16 language like "grocery list," which we will talk about soon?  
17 Come on. Of course he knew these lists were confidential and  
18 he wasn't allowed to share them.

19 Let's take a look at an example of his early  
20 participation in these crimes. He passed along information  
21 about two of the PCAOB's international inspections of KPMG  
22 clients. He did it in October of 2015 and again in November  
23 2015.

24 Let's look at the October 2015 email for a minute.  
25 Brian Sweet emails Dave Middendorf, Tom Whittle, David Britt

1 and others. "I got a call from an old colleague over the  
2 weekend." We'll talk about who that old colleague is, but you  
3 already know. Cindy Holder called him, was passing  
4 confidential information that she had gotten from their source,  
5 Jeff Wada.

6 "The old colleague let me know that a decision had  
7 been made." That's a decision at the PCAOB, PCAOB's internal  
8 deliberations about who to inspect.

9 "A big bang from Switzerland to Japan." That means  
10 Credit Suisse and Sumitomo.

11 Why did he share this? He makes it clear in the last  
12 sentence of this October 20th email. "I wanted to give you a  
13 heads-up as it may impact where we devote the most time and  
14 attention in the coming months." What is he saying there?  
15 Here is some more confidential information and I'm sharing it  
16 so we can use it.

17 Who was the old colleague? Brian Sweet told you when  
18 he wrote that email he was talking about Cindy Holder, who had  
19 in turn received a call from Jeff Wada.

20 And how do you know that it was Wada in October?  
21 Sweet said that he got a call over the weekend. Let's look at  
22 Wada's phone records. On Saturday, October 17, 2015, Wada and  
23 Holder spoke for 60 minutes. This is from Wada's phone record,  
24 Government Exhibit 412. That cell phone number ending in 1277  
25 is Cindy Holder's cell phone, as you have heard throughout the



1 case. This 60-minute call between California and Texas,  
2 between Wada and Holder, that was Wada passing this tip to  
3 Holder.

4 How do you know that it was him in November 2015 when  
5 there was a follow-up tip share? Same thing again. The day  
6 before Sweet sends this November 10th email, the day before,  
7 November 9th, Wada and Holder speak for 14 minutes.

8 On November 10th what was Sweet doing? He was  
9 updating Middendorf and the others about the information he had  
10 shared in October. He forwarded the October email on November  
11 10th with this new information. "I've been told that it's not  
12 going to be Japan. Instead it will be Germany. So that means  
13 Deutsche Bank in lieu of Sumitomo," confidential information  
14 about who the PCAOB was going to inspect.

15 Jeff Wada's phone records, ladies and gentlemen, you  
16 will have them in the jury room. You can look at them. They  
17 are in evidence as Government Exhibits 406 and 412. Those are  
18 the records for the cell phone he used to talk to Holder, to  
19 text with her. All those incriminating text messages came from  
20 that cell number. That's the number he used every single time.  
21 Look through those records, ladies and gentlemen. Every time  
22 there is confidential information coming through to KPMG, you  
23 see a phonecall between Wada and Holder.

24 Now, why did Wada do this in 2015? To help himself.  
25 To prime the pump for an eventual job at KPMG. Just months

1 before, he was passed over for promotion at the PCAOB, just  
2 months before joining the scheme. There was a promotion  
3 announcement. He wanted to make associate director, or AD. He  
4 wanted to do that so he could go to KPMG as a partner with a  
5 commuting package. If he gets to be a well-seasoned AD, he  
6 said, maybe he could get that partner title and a fat payday.  
7 Wada wanted the fat payday that he would get as a partner at  
8 KPMG.

9 In the fall of 2015 what did Sweet do with this  
10 confidential information? He turned around and, as you saw, he  
11 gave it to Middendorf and others. Two times Middendorf  
12 received these emails, October 2015 and November 2015, more  
13 hard evidence that Middendorf knowingly got confidential PCAOB  
14 inspection information.

15 Just like in May 2015, in October-November 2015 he  
16 didn't blow any whistles. He didn't report this. He used it.  
17 He wanted it. He demanded it. And this was no gossip, as you  
18 heard Middendorf say on the stand.

19 Gossip at work, ladies and gentlemen, everyone knows  
20 what gossip at work looks like. It's when raises are going to  
21 be announced, who gets the good parking space, whether Steve  
22 from marketing and Nancy from HR are dating. That's gossip.

23 This was no gossip. This was confidential information  
24 about who KPMG's regulator was going to inspect as part of a  
25 formal inspection instituted by a congressional act. This was

1 not gossip. That's absurd.

2           You know this wasn't just gossip because, just like  
3 the 2015 list, this confidential tip was acted on. David  
4 Britt, another member of the scheme, sent an email to some  
5 colleagues asking, saying, we may want to consider doing  
6 something with Sumitomo. Don't think it has an ALL, but ask  
7 Steve.

8           What does that mean? You heard a lot of testimony in  
9 this case about the ALL monitoring program. That's what Britt  
10 is talking about here. I don't think it has an ALL, I don't  
11 think we can put it in the ALL monitoring program, but we can  
12 take another look because of the fair value, we can take  
13 another look through a different monitoring program. This was  
14 sent by another one of Middendorf's subordinates, another  
15 member of the circle of trust. Extra time, extra resources  
16 because of confidential inside information.

17           Several months later, Brian Sweet said in an email --  
18 and you can take a look at this, ladies and gentlemen,  
19 Government Exhibit 931 -- Sweet says, because of this  
20 confidential information about Credit Suisse and Deutsche Bank,  
21 the October and November tips from Wada, because of that, these  
22 two were added to the monitoring programs as a result. More  
23 work, more effort to affect comments because of this illegal  
24 inside confidential information.

25           That wasn't all they did with the tip. You saw in

1 January 2016 a group, including Sweet, met to go over comments  
2 that were issued in the last inspection of Credit Suisse. You  
3 heard from Sweet that they didn't normally do this. The only  
4 reason they did this was because they had been told, thanks to  
5 Wada, that Credit Suisse was going to be inspected. More  
6 action taken on illegal inside information, more of an effort  
7 to manipulate the inspection results in a way that they thought  
8 the PCAOB would never find out about. Wada's inside  
9 information was paying off.

10 But inspection results weren't really turning around.  
11 You heard about that Palantir project, the project with the  
12 data analytics firm that was spearheaded by Middendorf. When  
13 you think about Palantir, think about Middendorf's claim that  
14 inspection results weren't really that important, that he  
15 didn't really care about them.

16 Middendorf spearheaded this project. He signed  
17 a million-dollar contract with Palantir in exchange for  
18 Palantir accurately predicting the PCAOB's inspection  
19 selections. This was not about improving overall audit  
20 quality. It was about figuring out the PCAOB's picks so they  
21 could game the system. Remember, Palantir's payout depended  
22 entirely on its rate of success in picking the PCAOB's  
23 selections. The idea that turning around KPMG's inspection  
24 results wasn't important to Middendorf is just outright  
25 laughable.

1 Things were not turning around, at least not fast  
2 enough. In 2016 KPMG was in hot water with the SEC for its  
3 track record of bad inspection results. The chair of the SEC  
4 even had a meeting with Middendorf and other KPMG leadership.  
5 In the SEC's view, Middendorf and the others had to be taken to  
6 task for their poor performance on PCAOB inspections, for their  
7 lack of responsiveness.

8 The meeting was held at the SEC's headquarters in  
9 Washington, D.C. There were two meetings held that day with  
10 the chief accountant and the chairman of the SEC. That meeting  
11 was held at the SEC. It was known at the SEC as the Come to  
12 Jesus meeting. Why? Because there were serious concerns  
13 regarding the performance, the inspection performance, and the  
14 responsiveness of the firm.

15 Ladies and gentlemen, think about this for a minute.  
16 In KPMG's world it pretty much gets no higher than meeting with  
17 the chair of the SEC. In that meeting the SEC chair chastised  
18 KPMG for its poor inspection results. That is a huge deal.  
19 What did Middendorf say to you about this, about the sharp  
20 criticism that the SEC gave that day about KPMG's inspection  
21 results? Once again, "I don't recall."

22 The inspection results didn't just matter to the PCAOB  
23 and the SEC. Middendorf's own boss, Scott Marcello, the head  
24 of audit for the entire firm, told Middendorf "reducing our  
25 PCAOB comments is our first priority." Whether PCAOB

1 inspection results mattered to Middendorf's friend and former  
2 client, they sure mattered to his boss. The pressure was on.

3 It was no coincidence that when Wada delivered a  
4 confidential inspection list of the banking selections the very  
5 next month, the very next month after the Come to Jesus meeting  
6 at the SEC, Middendorf and his cohort jumped on it right away.  
7 Let's look at what happened on March 28, 2016. Middendorf  
8 doesn't even dispute most of this.

9 Wada at that time was increasingly disgruntled. Just  
10 a couple of weeks before stealing and sharing the list, he sent  
11 this email to a co-worker. He saw himself as having gotten  
12 screwed by the PCAOB. Knowing exactly what he was doing, he  
13 went into the PCAOB computer system and he took the list of  
14 KPMG's banking clients that the PCAOB was going to inspect in  
15 2016.

16 Why did it matter that these were banking clients?  
17 That's because those are the ones with that allowance for loan  
18 loss issue on their audits, the ALL that you have heard so much  
19 about, an historic problem area for KPMG on inspections.

20 And this list, that wasn't a small heads-up. This was  
21 very serious. KPMG had not been notified yet about a single  
22 inspection on this list, not one of them. And every single one  
23 was highly confidential. The audits were still in that 45-day  
24 documentation period after the report was signed and the  
25 opinion issues. This illicit information could really be used.

1           On March 27, 2016, Wada asked Holder to call him.  
2       "Call me first thing if you can." They spoke the next day.  
3       They spoke for 51 minutes in the middle of the day on March  
4       28th, Wada on his cell phone and Holder on this KPMG number.  
5       You know that the person Wada talked to that day for 51 minutes  
6       was Cindy Holder because just about an hour after hanging up  
7       with him she emailed her boss. She told him to call her on  
8       that number when he asked for a five-minute chat. That was  
9       Holder talking to Wada on March 28, 2016.

10           And you know exactly what Wada passed to Holder on  
11       that call because of what Holder did next. She got off the  
12       phone with Wada at 1:33 p.m. The very same minute she hung up  
13       with him, that very same minute she called Sweet. She tried  
14       desperately to reach him. She called his office number one  
15       minute later. She called his cell number. She texted him the  
16       same minute. "Call me as soon as you can," three exclamation  
17       points. She again called his cell number.

18           Why? Why was she frantically trying to reach Brian  
19       Sweet after talking to Wada? Because she had the list, the  
20       list that Wada had just given her.

21           (Continued on next page)

22  
23  
24  
25

1 MS. KRAMER: And then they spoke. And what a call it  
2 was. Brian Sweet told you had about it. Holder said she had  
3 received a call from Jeffrey Wada, that Wada had provided her  
4 with the names of who the PCAOB was going to be inspecting for  
5 the banks in 2016.

6 So what did Sweet do? Exactly what he knew he was  
7 supposed to. He immediately reached out to his bosses. He  
8 tried to call Whittle. When he didn't reach him, he emailed  
9 him. He tried to call Britt. When he didn't reach him, he  
10 emailed him. And then he spoke with Whittle and Britt -- two  
11 other members of Middendorff's circle of trust. They spoke and  
12 decided to act quickly, right away, to try to set up a meeting  
13 with the man in charge of them all -- Middendorff. Whittle told  
14 you, he pulled Middendorff out of the meeting. He doesn't just  
15 step out to tell him about this list.

16 Then just a couple of hours after Wada gave the list  
17 to Holder, in breach of his duty, Middendorff, Whittle and Britt  
18 gathered around a table in a KPMG conference room, right here  
19 in Manhattan. They got Sweet on the phone. They spoke for an  
20 hour while Sweet shared the secret confidential list of the  
21 banking selections for 2016.

22 You have seen David Britt's notes from that day, notes  
23 that contain the list, the very notes that were taken from his  
24 office at KPMG after the scheme unraveled. Now, I will come  
25 back to these notes in a minute, but let's just pause for a



1 second at what Middendorf said about this meeting, about this  
2 hour-long meeting, where the list was provided. A meeting  
3 that's corroborated not just by Britt's notes but also phone  
4 records, Sweet's testimony, and Whittle's testimony.

5 What did he say about it on this stand? "I don't  
6 recall." Once again, two witnesses from that meeting testified  
7 that Middendorf was there. Consistently, Tom Whittle told you  
8 he wasn't acting on the stolen information, not at any of these  
9 points in time, without Middendorf's sign-off. And they both,  
10 Whittle and Sweet, relayed to you that Middendorf was there,  
11 that he fully participated. He helped come up with the devious  
12 plan for the stealth rereviews.

13 So why the claimed lack of memory? Why "I don't  
14 recall" again? Because if Middendorf admits his participation  
15 in this meeting, he knows that he's done: "I don't recall."

16 So what did they do in that meeting? You heard a lot  
17 of testimony about this. They hatched a criminal plan to  
18 revise the workpapers for the audits on the list as much as  
19 they possibly could without getting caught. They decided to  
20 conduct what they called "stealth" rereviews -- secret  
21 rereviews.

22 Use using a legitimate monitoring program, the ALL  
23 Monitoring Program, as a cover, they tried to hide from the  
24 PCAOB, and anyone else who came looking, that they took all of  
25 this action because of illegal confidential information. They

1     tried to pretend it was just business as usual. But this  
2     wasn't business as usual, not by a long shot. You've heard  
3     that the monitoring program was normally used while the audits  
4     were still live, while the engagement team were still actually  
5     doing their work. That was the point of the monitoring  
6     program. That's what Tom Whittle told you. Not to go in, to  
7     edit the workpapers. But they were devious and they were  
8     careful. They were sophisticated. And they wanted to cover  
9     their tracks.

10           Now, one way, an easy way, that you know that this was  
11     not legitimate in anyone's mind, they agreed to keep the plan  
12     within their circle of trust, to keep it a secret. So let's  
13     look at the list that Wada shared. He shared the real list  
14     from the PCAOB.

15           So look at David Britt's notes from that day with the  
16     PCAOB document that show you who it was going to inspect in  
17     2016. They match up perfectly. I'll just go down the list --  
18     Century Bancorp, UMB Financial. You can see on Government  
19     Exhibit 652 that it matches up with the PCAOB's documents --  
20     one after another, after another, after another, the entire  
21     list. This was real. And it's real because Wada, who had  
22     access to this part of the PCAOB system, got in there and took  
23     the real information, and he shared it so KPMG could use it.

24           So, that night, after the meeting, Britt sent out an  
25     email that Middendorf was on -- his partner in crime and his

1 boss.

2           This is how the stealth rereviews started. So let's  
3 look closely at what this email says. It is Government Exhibit  
4 954. "URGENT," he wrote in the subject line. "As part of our  
5 wrap up and reporting of the results of the ALLL monitoring  
6 program we need to gather some additional information from the  
7 eAudIT files."

8           This was a blatant lie. They weren't gathering  
9 additional information. This wasn't part of the wrap up and  
10 reporting. It was a scheme to manipulate inspection results,  
11 to cheat the regulator. And this email was a flat out lie -- a  
12 lie to their own partners at KPMG.

13           What did Middendorf say about this when he thought --  
14 about what he thought when he received this email, with  
15 outright lies in it? What did he take that stand and tell you?  
16 "I don't recall."

17           Another incriminating email and another claimed lack  
18 of memory.

19           But when pressed on cross-examination, Middendorf  
20 conceded that it was untruthful. He didn't want to say it was  
21 an outright lie, but that's exactly what it was. And when  
22 something is business as usual, you don't lie to your own  
23 partners. So how did he try to explain this to you? This  
24 email that he didn't remember? The fake cover story? He said  
25 that he and Whittle didn't want to stress the partners out.

1           That makes no sense even on the face of the email. If  
2           you don't want to stress out your partners, do you send an  
3           email late at night with a subject line in all caps, "URGENT,"  
4           coming from the National Office at KPMG? Of course not. It's  
5           just silly. It makes no sense. They lied to avoid getting  
6           caught, not to avoid stressing people out. Your reason and  
7           common sense tells you that, ladies and gentlemen.

8           And they didn't just lie in the text of the email.  
9           They sent this to all of the engagement partners in the ALL  
10          Monitoring Program -- every single one of them.

11          But you know from all the testimony that there were  
12          only about seven banks on the stolen list that they actually  
13          intended to do rereviews on. So, why email every single  
14          partner? Why not just email the seven? Even if you tell the  
15          same lie, why not just email the seven you're going to look at?

16          Because they wanted to cover their tracks and they  
17          wanted to do it well. There's no other reason to include all  
18          those people on this email. They wanted to hide their scheme.  
19          They wanted to avoid getting caught.

20          Do you want to know what intent to defraud looks like,  
21          ladies and gentlemen? This is it.

22          So when Middendorf tells you that he doesn't recall  
23          this, you should take that testimony, along with all the other  
24          claims, failures of recollection, as you bring your reason and  
25          your everyday experience to the table in the jury room when

1 you're evaluating his credibility. He's a seasoned,  
2 sophisticated, smart executive. And no matter how sympathetic  
3 he may appear, or how much you may want to believe him, he  
4 can't make facts disappear. He can't forget away  
5 incriminating, devastating, hard proof of his knowing  
6 participation in this scheme.

7           So let's take one more look at the subject line,  
8 because the why of the urgency is important. Why was this  
9 "URGENT", in all caps? Because the clock was ticking. They  
10 were up against the end of the 45-day documentation period.  
11 They wanted to get their hands on those workpapers so they  
12 could make as many changes as they could get away with making  
13 before the workpapers have to be locked down. To fully exploit  
14 this inside information, they had to act fast. And act fast  
15 they did.

16           Mere hours passed from the time Wada gave the inside  
17 information to Holder and this email was sent. The stealth  
18 reviews were underway. So they dispatched members of the  
19 National Office, including Sweet, Holder and others, to conduct  
20 the stealth rereviews. And they lied. They lied to partners  
21 along the way about what they were doing. And they didn't just  
22 limit their scheme to the audits on the list that were in the  
23 ALL Monitoring Program. Right? That was just cover for doing  
24 everything they could to exploit the entire list. So they had  
25 to reach out individually to other people to look at the

1 workpapers, to try to make changes, or they couldn't use the  
2 cover of this monitoring program.

3           You saw that David Britt asks Sweet to invite Chris  
4 Van Voorhies, the engagement partner on NewStar, one of the  
5 banks on the list, to be on the call that Sweet was going to  
6 have with the rereviewers, so that Van Voorhies could do his  
7 own rereview, to make his own changes to the workpapers.

8           And what did Britt say when Sweet asked if Van  
9 Voorhies knew what was really going on? "Have you spoken to  
10 him already?" Sweet said. This is Government Exhibit 941.  
11 Sweet says, "I sure will add him. Thanks, David. Have you  
12 spoken to him already? Have you told him what we're really  
13 doing here? Have you told him why?"

14           How did Britt respond?

15           "I told him I would ask you, that the others on the  
16 call did not know what I told him, and he had to keep his mouth  
17 shut."

18           This -- this is not the language of business as usual  
19 or doing something you think is OK. This is the language of  
20 criminality, and this was part of the scheme that Middendorf  
21 participated in. Part of the rereviews he helped orchestrate,  
22 the stealth rereviews, that the real reason of which was kept  
23 in the circle of trust.

24           So Sweet had his call the next day to get things  
25 rolling, to tell the rereviewers what to look at. And as he

1 had been told, he lied. He told them that they were going to  
2 start with the riskiest of engagements. This was no risk  
3 analysis. This was a list of inside information from the  
4 regulator.

5 And Sweet did as he was told and invited Van Voorhies  
6 to the call.

7 So what was the objective of these rereviews? What  
8 was their purpose? You heard Tom Whittle tell you: "To get  
9 the workpapers in great shape so that we would avoid PCAOB  
10 comments."

11 And that's exactly why they made so many changes to  
12 the workpapers. Look at some of the workpapers that are in  
13 evidence. This is not a ledger, ladies and gentlemen. This is  
14 not the balancing of your checkbook where you're just crossing  
15 the T's and dotting the I's. These are complicated, extensive  
16 memos designed to explain to the PCAOB inspectors why they did  
17 some things, why they didn't do other things, what the weak  
18 spots were, how their analysis can be relied on.

19 Look at them, ladies and gentlemen. Look at the  
20 changes, the extensive changes to these complex memos. This  
21 was not cleaning up. This was trying to make them more  
22 persuasive, make them more compelling, improve their quality,  
23 make it look to the inspection team like KPMG's quality, when  
24 no one was looking, was the end result of this. When it  
25 wasn't. Not at all. This was all extra, after they got the

1 inside information.

2 Every single witness you heard from agreed that the  
3 quality of workpapers matters to whether a comment is issued.  
4 These were edits that made a difference to PCAOB inspectors.

5 Stephanie Rodriguez, the KPMG team lead for the U.S.  
6 at the PCAOB, told you that the quality of workpapers affects  
7 the outcome. And every other witness you heard from said the  
8 same thing.

9 Now, you heard the argument that the rereviews didn't  
10 matter, they were OK, because the PCAOB supposedly doesn't  
11 write comments for documentation. But that is a self-serving  
12 claim after the fact that is not at all supported by the  
13 evidence. And for awhile, until he was confronted on  
14 cross-examination, Middendorf tried to tell you the same thing.

15 But you heard again and again from witness after  
16 witness that the quality of the workpapers matters a great  
17 deal. It's only the utter failure to document work that is  
18 proven to have been done that doesn't get a comment. That's  
19 what no comments for documentation means. Not that all of  
20 these lengthy memos, what they say doesn't matter. That's  
21 ridiculous. It's apples and oranges.

22 And your common sense tells you that's true for one  
23 very, very simple reason. If the changes to the workpapers  
24 didn't matter, if they didn't affect whether comments were  
25 given, why would they go through all this? Why would they do



1 these rereviews if they thought it didn't make a difference  
2 whether comments were issued? Avoiding comments was the whole  
3 point of this exercise.

4 Doing it, cleaning up the workpapers, changing them  
5 without telling the PCAOB that those changes were made because  
6 of secret inside information, that was pure deception.

7 And let's just stop here for one second because  
8 there's so much evidence that the point of these workpaper  
9 changes was to avoid comments without the PCAOB knowing. This  
10 really mattered to the PCAOB, seeing the true work of the  
11 auditor. You heard that again and again. It was part of the  
12 design of the inspection process. It's the reason that they  
13 almost never sent out notifications of inspections until after  
14 the workpapers were shut down. They wanted to sample, right,  
15 to not look at all 700 audits, but to look at 50 and get a true  
16 look at the quality of the firm.

17 Stephanie Rodriguez was unequivocal: "We do not want  
18 firms modifying the workpapers with knowledge of us -- just  
19 because it is going to be inspected. Our goal is to review  
20 workpapers that haven't been altered or modified with knowledge  
21 of an upcoming inspection."

22 And you heard testimony from two different witnesses  
23 that the PCAOB expressly required firms to document workpaper  
24 changes in those rare cases where the notification was sent  
25 within the 45 days. So, for scheduling or other reasons, when

1 the PCAOB tells the firm we're going to inspect a certain audit  
2 and the 45-day work period -- workpaper period is not up, the  
3 PCAOB asks the firm to document any changes or modifications  
4 that were made to the workpapers after that notice.

5 Not just new audit work. Not just work that would  
6 require special documentation under an auditing standard.  
7 Every single modification.

8 And Brian Sweet explained to you that that mattered  
9 from his experience at the PCAOB as an inspector, and that it  
10 had happened on a KPMG inspection.

11 And that -- that directive was in KPMG's own internal  
12 emails telling the engagement teams that an inspection had been  
13 notified. Government Exhibit 1063, this is a KPMG email,  
14 ladies and gentlemen, making plain that the PCAOB doesn't want  
15 firms making changes after notification of any kind without  
16 documentation, without the PCAOB knowing exactly what they  
17 were. So if the report release date has passed, right, if the  
18 audit opinion has issued, but the documentation completion date  
19 has not yet passed, you're still in that 45 days, adhere to the  
20 auditing standards, but also a log should be maintained of any  
21 new documentation, changes made to the documentation, or any  
22 sign-offs on documentation after the notification.

23 The PCAOB told KPMG to document even the smallest of  
24 changes in the 45 days. It mattered to the PCAOB, and  
25 Middendorf knew that. The notion that he thought that there

1 was nothing wrong with keeping everything they did in the  
2 rereviews a secret from the PCAOB, hidden from the regulator  
3 that was doing the inspection, it defies not just common sense  
4 but also KPMG's own experience with the PCAOB, KPMG's own words  
5 on the subject. It's an after-the-fact desperate claim, and  
6 you should not give it a single ounce of weight.

7 Now, you heard a lot about how the rereviews complied  
8 with the auditing standards. Why was that? They're breaking  
9 the rules. Why not break more?

10 Because they didn't want to get caught. Keeping it a  
11 secret was critical. And when you have engagement teams who  
12 were inputting your edits on the workpapers, they know if  
13 you're breaking a rule. They might blow the whistle. And if  
14 you're doing new audit work that gets documented and the  
15 inspectors from the PCAOB come in and they notice, if they did  
16 new documents and audit work on all seven of these banks that  
17 were on our list, why is that? What happened here? And then  
18 your scheme is blown.

19 So you heard this from Brian Sweet. If others were to  
20 know the real reason, that would increase the likelihood of us  
21 getting caught.

22 And Whittle explains, the avoidance of AU 390 work,  
23 that new audit work, wasn't because they wanted to abide by  
24 accounting standards and follow the rules. They're already  
25 neck-deep in a fraudulent scheme breaking the rules. That's

1 not why they did it. They did it in an effort to avoid being  
2 caught.

3 Do you think that this sophisticated executive with  
4 decades of experience, at the highest level of the financial  
5 world, would commit this crime in a way that would call PCAOB's  
6 attention to it? Do you think he would make it easy for  
7 someone to catch him? No way. Complying with the auditing  
8 standards is not evidence of innocence, ladies and gentlemen.  
9 It's evidence of criminality.

10 THE COURT: Is there an objection?

11 MR. BOXER: Yes, to the last sentence.

12 THE COURT: OK. Hold on.

13 (Pause)

14 All right. I will just clarify that I will be  
15 explaining the relevant legal standards when I give you my  
16 charge and those will control.

17 MR. BOXER: Thank you, your Honor.

18 MS. KRAMER: So as the rereviews progressed and the  
19 inspections of audits on the stolen 2016 list move forward,  
20 Middendorf kept close watch over what was happening. You saw.  
21 He requested research. He got someone access to workpapers, to  
22 do one of these rereviews outside the cover of the monitoring  
23 program, and he followed up regularly. He was careful with  
24 what he put in writing.

25 You saw this email between the Whittle and Middendorf

1 about who should do the rereview for Bon-Ton, a department  
2 store that was not in the ALL Monitoring Program.

3           They didn't say "Bon-Ton" in this email. They just  
4 called it a retailer. And Whittle told you why. "We didn't  
5 want anyone to know that we were corresponding about an  
6 engagement that was on the PCAOB selection list."

7           And as part of this scheme, they even outright lied to  
8 the PCAOB. You heard that in one of the rereviews, a team  
9 discovered a problem with the audit of AMBAC's internal  
10 controls over financial reporting. KPMG withdrew its opinion  
11 on that, and AMBAC had to file new financials with the SEC, an  
12 amended 10-K.

13           Now, if the AMBAC audit was inspected after this, it  
14 would definitely be a comment. So, Whittle called the PCAOB  
15 and outright lied. He told the PCAOB that this restatement of  
16 events had just happened in the normal course of the National  
17 Office's review. And he told the PCAOB nothing -- nothing --  
18 about the inspection list.

19           He was asked if he disclosed to Mr. Schindler, from  
20 the PCAOB, that he had knowledge that AMBAC would be inspected:  
21 No. I purposely left that the information out.

22           Why?

23           Because he knew -- he knew just like Middendorf  
24 knew -- that it was confidential, and they didn't want the  
25 PCAOB to know that they had that information.

1 And that wasn't the only lie they told to the PCAOB.

2 In September 2016, on the heels of the inspections  
3 that were the subject of the stealth rereviews, Middendorf  
4 participated in a meeting with PCAOB leadership. In that  
5 meeting, the success of KPMG's inspections on the ALL, that  
6 historic problem area, was touted. They bragged about getting  
7 comments down to zero in the corrupted 2016 inspections.

8 What didn't they tell the PCAOB? What was the  
9 elephant in the room that they tried to keep secret? That they  
10 had cheated. Middendorf admitted on cross-examination that he  
11 didn't tell the PCAOB that they had confidential information.  
12 That is not something they volunteered. There was no  
13 whistleblowing.

14 Why? Why did he choose not to share that with the  
15 PCAOB? Because he didn't want them to know.

16 That is a breathtaking admission, ladies and  
17 gentlemen. Look at Middendorf's intent. He didn't want them  
18 to know. Why? Because he knew it was wrong. So if you put  
19 aside all of this evidence of his intent, his deliberate  
20 conduct, the scheming, the lies, you put aside his  
21 sophistication and his experience, everything they told him  
22 about having these inspection lists from the regulator was  
23 absolutely wrong, you also have other evidence that he knew  
24 that what he was doing was wrong.

25 So do you remember EC9, the lifetime ban, that says

1 PCAOB employees can never share what they learn? This was --  
2 this was absolutely crystal clear to Middendorf because he  
3 signed a document in 2015, when he joined the Standing Advisory  
4 Group, he specifically signed a document in which he agreed to  
5 be bound by EC9 if he got information through that group. That  
6 tells you that he fully understood EC9 by the time he got the  
7 March list. He fully understood it because he signed a  
8 document agreeing to follow it.

9 When he joined the circle of trust, when he  
10 participated in the stealth rereviews, he knew exactly how  
11 wrong this was.

12 But what did Middendorf tell you about signing this  
13 document?

14 And let me just say again, to be crystal clear,  
15 defendants have no burden whatsoever. They do not have to  
16 prove their innocence. The burden rests entirely with the  
17 government. But you absolutely should scrutinize when a  
18 defendant does put on a case, when they do make arguments.

19 So look at what he said about yet another devastating  
20 document: "I don't recall." Once again.

21 So, let's take a closer look at the results of the  
22 corrupt 2016 inspections, because this time, this time their  
23 scheme really paid off. After months of scheming and plotting  
24 and covering their tracks, the inspections were done and the  
25 rereviews worked. That problem area that KPMG had been plagued

1 by year after year, those comments went down to zero, ladies  
2 and gentlemen. It was such a stark improvement that Tom  
3 Whittle, then Head of Inspections, was afraid of its  
4 implications. He told you on the one hand, he was very pleased  
5 that the results were so good, but he was also concerned,  
6 because if they didn't have the same information in a  
7 subsequent period, the next year, that they could see a return  
8 of deficiencies, more comments, and that would be difficult to  
9 explain.

10 And that's kind of what happened. Because once the  
11 scheme was discovered, the PCAOB conducted replacement  
12 inspections for 2016, ten or so new banks to replace the ones  
13 that had been corrupted by the defendants, the ones on the  
14 stolen 2016 list that Wada provided. And without the benefit  
15 of cheating on those 2016 replacements, no surprise here, the  
16 firm was back up to its normal level of comments on this  
17 problem area. Their cheating had worked.

18 So for 2016 you've seen the scheme to defraud:  
19 Overwhelming evidence that Middendorf and Wada participated  
20 intentionally, with a wrongful purpose, and with the intent to  
21 defraud, and of course all those emails and texts again across  
22 state lines.

23 That's Count Four, ladies and gentlemen, and they are  
24 guilty.

25 So, what did Middendorf do when the stealth rereviews



1 worked so well? What did he say to Brian Sweet when the  
2 comments came back at zero in that problem area? He praised  
3 him. He said how pleased he was that the inspection results  
4 had been so improved. He pointed to the fact that there were  
5 so many clean banking inspections, including the ones that had  
6 been subject to the stealth reviews. And he pointed out and  
7 was happy about the fact that they had three banks that were  
8 positive quality events identified by the PCAOB.

9           So let's just pause because that is a really  
10 remarkable thing: Two of KPMG's banking clients that were on  
11 the stolen list were chosen by the PCAOB as emblematic of  
12 excellent work, positive quality events that the PCAOB wanted  
13 to study and learn more about so they could learn what worked  
14 so well in those, share it with others, use that information.  
15 KPMG participated in calls with the PCAOB about this, calls  
16 where the PCAOB, the regulator, was trying to understand how  
17 did you do so well on these. And in not one of those calls did  
18 anyone ever tell the PCAOB, we have the secret list, that's how  
19 we did so well; we did these stealth rereviews that we thought  
20 there was nothing wrong with, that's how we did so well. They  
21 didn't say any of that. They kept it hidden. They kept it  
22 hidden because they knew it was wrong and they didn't want the  
23 PCAOB to know. They didn't want the PCAOB to know that they  
24 had a stolen confidential inspection list.

25           So Middendorf was thrilled with the outcome. And the

1 message was sent to Brian Sweet loud and clear, as clear as it  
2 was Sweet's first week: Add value, even in the gray areas.  
3 "Get that list" was an open request.

4 And Whittle told you as much, through the course of  
5 continuously asking him to get any information he could, it was  
6 an implied request to get whatever information he could, to get  
7 his hands on any confidential inspection information he could  
8 share with Middendorf and the other members of this scheme.  
9 The message was received loud and clear: Keep the illegal  
10 information flowing.

11 And flow it did, thanks to Jeff Wada.

12 Sweet talked about these requests with Holder, and  
13 then Wada delivered, with confidential information, again and  
14 again.

15 Here is an example from late 2016. This is a  
16 voicemail that Jeff Wada left for Cindy Holder in late 2016,  
17 December. Listen to his words, ladies and gentlemen.

18 (Government Exhibit 1401 played)

19 MS. KRAMER: At the beginning of this trial, ladies  
20 and gentlemen, Wada's counsel told you that Brian Sweet would  
21 be the narrator of a silent movie. This movie isn't silent.  
22 It's got full audio.

23 And listen to Wada's words, coded language, following  
24 up with Holder from their last conversation, from the last  
25 request, that he breach his duty and share stolen confidential

1 information.

2 And Wada came through again on January 9th.

3 (Government Exhibit 1402 played)

4 MS. KRAMER: Look at his words, ladies and gentlemen.  
5 He says excitedly, "I have the list, and I'd certainly be" --  
6 and then he catches himself. He stops himself. He realizes  
7 he's saying too much on a voicemail. So he tries to cover up  
8 what he's talking about. He scrambles: "So, um, the grocery  
9 list."

10 They weren't talking about a grocery list, ladies and  
11 gentlemen. They lived 1500 miles away from each other. He was  
12 in California. She was in Houston. And what does it even mean  
13 to have someone else's grocery list and you want to talk about  
14 it? It's absurd. "Grocery list" meant inspection list, and he  
15 was saying he'd certainly be willing to share it, to breach his  
16 duty yet again.

17 So on January 9th they spoke in the evening for almost  
18 half an hour, and Holder wrote down the so-called grocery list.  
19 She also took notes of other things Wada told her, about his  
20 ongoing failure to get promoted at PCAOB and who the new  
21 members of the Banking Inspection Group were. So let's look at  
22 those notes and the timeline for that day.

23 So that voicemail from Wada was in the afternoon, and  
24 then Wada and Holder speak in the evening. That's when she  
25 takes down those notes in the red handwriting, Government

1 Exhibit 1444.

2 We'll talk about those notes a little bit more in a  
3 minute.

4 And Brian Sweet took a photo of the notes, he told you  
5 that, right around the time that he went to tell Whittle about  
6 this. And the metadata on that photo shows you that it was  
7 taken at 7:45 p.m., after the call between Wada and Holder.

8 Now, you may remember that Whittle couldn't remember  
9 exactly when that day he got the list from Sweet, and Sweet  
10 thought it was right after lunch when Holder emailed him. But  
11 you have the documents to tell you the precise time. You know  
12 that it was later in the day because of the timing of the  
13 voicemail, the call, and the photo of the notes.

14 And these little inconsistencies are normal and are  
15 powerful evidence that these witnesses are telling you the  
16 truth. They're not trying to get their story straight but  
17 telling you things exactly as they remember them.

18 And this testimony is corroborated from witnesses at  
19 the -- their testimony, Whittle's and Sweet's testimony, about  
20 this day, and about all the other things in the case, is  
21 corroborated by lots of other evidence that you've seen --  
22 witnesses, some witnesses they barely ever talked to, at KPMG,  
23 the PCAOB, and the SEC, and by documents they weren't even on,  
24 calendar invites and emails. Their testimony is consistent  
25 with each other but not exactly so. And they didn't

1 conveniently forget every single document that was bad for  
2 them.

3           So the evidence is clear that on January 9th, during  
4 this call, Wada gives the list to Holder. She then meets with  
5 Sweet, and he takes it down in the top right corner of  
6 Government Exhibit 655. You can look at that, ladies and  
7 gentlemen.

8           And Sweet spoke with Whittle and gave him the list.  
9 And Whittle got the list to Middendorf, who took it down on his  
10 phone. That evidence isn't really in dispute.

11           But before we get to that, let's look at how Wada  
12 stole the January 9th list, the preliminary list of some of the  
13 PCAOB selections. These are the documents that you saw during  
14 the trial that were on Wada's computer, KPMG documents that he  
15 had downloaded from the PCAOB system so that he could exploit  
16 them and use them for his own benefit and share them.

17           Government Exhibit 89 is an Excel spreadsheet.  
18 Government Exhibit 80 is a memo of the PCAOB's Top 30  
19 recommendations. These documents are what Wada used to pull  
20 together the January 9th preliminary list and share it with  
21 Holder.

22           So that spreadsheet, it's an Excel file, and you'll  
23 have it in the jury room on the computer if you want to look at  
24 it, Government Exhibit 89. It's sorted by total combined  
25 flags. Remember, that's confidential PCAOB information about

1 the risk that they assigned to each audit. And when you sort  
2 it by financial institution in the ALL Monitoring Program, look  
3 at the list you get.

4 Now, this document, you'll see in a stipulation that  
5 is Government Exhibit -- or Defense Exhibit 1381, was last  
6 modified December 6, 2016, before Wada's call with Holder.  
7 When he gave this information to her, it was fresh.

8 The other document he used was Government Exhibit 80.  
9 Now, this is a memo with recommendations of who should be  
10 inspected. And let's look at how the list was compiled:  
11 "CitiGroup, not Wells Fargo, Valero, Applied Materials," and on  
12 and on. Let's compare that to Sweet's list, Government Exhibit  
13 655. You take each of the lists from those two documents and  
14 you put it side-by-side with the list that Holder gave Sweet on  
15 January 9th and it matches up perfectly.

16 You know what else matches up, ladies and gentlemen?  
17 Some of the texts from the documents that Wada stole. Looking  
18 at Government Exhibit 80, "not a particularly compelling  
19 inspection candidate when compared to CitiGroup. However, it's  
20 the only issuer in the Top 30 this year that's never been  
21 inspected." And what do Sweet's notes say from his meeting  
22 with Cindy Holder where she passed him some information on  
23 January 9th? "Not compelling compared to Citi but is only Top  
24 30." this is Wada's information that was shared on  
25 January 9th.

1 Now, Wada's counsel has made the suggestion to you  
2 through this trial that Wada wasn't the person at the PCAOB who  
3 leaked this information, that it was one of -- a list of many  
4 people, anyone who worked there, basically. The mountain of  
5 evidence that you've seen in this case absolutely decimates  
6 that ridiculous claim. The calls, the text messages, the code  
7 words, and the documents on Wada's own computer that match the  
8 list he shared, they all make that claim that it was someone  
9 else absolutely ridiculous.

10 And, importantly, you know of course now exactly why  
11 he did this on January 9th. That night, just after midnight,  
12 hours after sharing the January 9th list, Wada sent his résumé  
13 to Holder, finally trying to cash in on all that confidential  
14 information he had shared. And he did this just hours after  
15 complaining to Holder again that he wasn't promoted.

16 On the right of Holder's notes from January 9, 2017,  
17 on the top part is about Wada's failure to advance, "Once again  
18 getting screwed by the PCAOB." He told her he was  
19 distinguished, he had received these rewards, EE, but no  
20 promote.

21 That tells us everything you need to know, ladies and  
22 gentlemen, that résumé coming in just after midnight the day he  
23 shared the January 9th list, that tells you everything you need  
24 to know about Wada's intent, his knowing participation in this  
25 scheme, his intent to defraud the PCAOB.

1           So let's look at what happened the next day.  
2 Middendorf and Whittle speak for 43 minutes. And you know that  
3 Whittle told you he was sharing the list with Middendorf on  
4 that call. And about ten minutes into the call, as he  
5 admitted, Middendorf created this note on his iPhone. He  
6 started writing the list down in the notes function of his  
7 phone.

8           So let's think about this call for a second, ladies  
9 and gentlemen. A high-level executive at one of the top four  
10 international accounting firms in the world, in the middle of  
11 the day, speaks with a subordinate who starts giving him  
12 information, someone he could with the snap of his thumbs order  
13 to write a memo or to send an email.

14           And you've seen lots of emails with prediction lists,  
15 analyses. Right? That was common. That's not what Middendorf  
16 did here. Instead, he stood or sat somewhere, with his phone  
17 on speaker, typing on those tiny buttons into the notes  
18 function of his phone. Why? If this was legitimate, if these  
19 were predictions, why not say, Thanks for the heads up, send me  
20 the list, I'm on my phone? Why didn't he do that?

21           You know why, ladies and gentlemen. It is common  
22 sense. Because he knew it was wrong. He knew that, once  
23 again, once again, after the May 2015 list, the fall 2015 tips  
24 about Sumitomo, Credit Suisse, Deutsche Bank, the March 2016  
25 list, once again he's getting confidential inside information



1 that he's not allowed to have. It is wrong, and he knows it,  
2 and that's why he put it on his phone.

3 To avoid a paper trail, to avoid another devastating  
4 email that he'd have to claim to forget.

5 Your Honor, I understand that someone is in need of a  
6 break so this is a logical stopping point.

7 THE COURT: Sure. Why don't we take a quick bathroom  
8 break, folks. We'll take about a ten-minute recess.

9 Please leave your notepads on your chairs and we'll  
10 continue in ten minutes.

11 (Jury not present)

12 THE COURT: You may be seated.

13 Anything anybody wanted to address before the break?

14 (Pause)

15 MS. MERMELSTEIN: No, your Honor.

16 THE COURT: OK.

17 (Recess)

18 (Continued on next page)

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(Jury present)

THE COURT: Ms. Kramer, you may proceed.

MS. KRAMER: Thank you, your Honor.

Ladies and gentlemen, we were talking about the January 9th list that Whittle shared with Middendorf on a phonecall in the middle of the day and that Middendorf put down on his phone. Let's take a look at the list he created that day in the Notes function of his iPhone. On the left is the list that Sweet took down during his meeting with Cindy Holder on January 9th. On the right are the notes from Middendorf's phone. Let's take a look.

Valero, Applied Materials, Charter Communications, Macy's, Home Depot, in the same order. Lakeland, Midland State, National Bank Holdings, Heartland, Northern Trust, with the same break between them. Then, the notes at the bottom of Brian Sweet's list in Government Exhibit 655 match the notes in the top of Middendorf's list exactly: Citi, Synchrony, Wells, BONY. There is no mistaking that these are the very same lists.

What does this tell you about Middendorf's claim that these were just predictions? The lists match perfectly. You're looking in Government Exhibit 655 at Sweet's handwritten notes on the top right corner of the manila folder. If Sweet was making a list of predictions, would he write them in chicken scratch on the corner of a folder? Of course not. He

1 put them in a nice-looking spreadsheet and he'd send them by  
2 email, as you had seen him do before on more than one occasion.

3 If Sweet got this information from Holder that came  
4 from Wada and for some reason, notwithstanding Middendorf's  
5 demand for the information in May 2015 and his open arms and  
6 continuing request for it that led to the lists in May 2015,  
7 the tips in the fall of 2015, the March 2016 list, even if for  
8 some reason that I can't even fathom Sweet wanted to claim,  
9 falsely, to Whittle and Middendorf that these were predictions,  
10 he wouldn't have shared them on the phone; you wouldn't have  
11 seen them getting passed from Sweet to Whittle on a phonecall  
12 and then from Whittle to Middendorf on a phonecall, and then  
13 typed into a phone; you would see an email from Sweet trying to  
14 take credit, claiming these were predictions.

15 That's not here either, because no one ever said these  
16 were predictions, not a single person. Sweet didn't tell you  
17 that. Whittle didn't tell you that. And that is not at all  
18 borne out by the actual physical evidence you've seen, the  
19 documents.

20 Once again, Middendorf agreed to act on this illegal  
21 inside information. Whittle told you they focused their  
22 attention on things they could do on particular engagements,  
23 initial procedures, follow-up.

24 And these audits in January 2017, they were live, they  
25 were ongoing. This wasn't after the documentation period.

1 This wasn't in the documentation period. This was before the  
2 audits were even complete, when actual audit work could be done  
3 differently, better, with knowledge of an impending inspection  
4 down the road, knowledge the PCAOB never wanted its inspection  
5 targets to have.

6 Do you know what didn't happen January 9, 2017?  
7 Middendorf didn't blow any whistles. Even if he had his head  
8 in the sand, which isn't borne out by the documents, he had  
9 another list, another list for Brian Sweet by phone. He didn't  
10 make a single call to Judge Holmes saying you really should  
11 look into this. Of course he didn't, because he was at the  
12 heart of the scheme. This is what he wanted.

13 How did they try to exploit the January 2017  
14 preliminary list? They put additional people, extra resources,  
15 on four of the engagements on the list: Valero, Charter  
16 Communications, Citi, and Macy's. They sent extra people to  
17 work on Citi. And Tom Whittle told you they talked about it.  
18 Whittle and Middendorf discussed this. They would not have  
19 done it if Citi wasn't on this inside stolen list.

20 Same thing with Macy's. They sent extra people,  
21 additional resources, because of their presence on the list.  
22 What is special about Macy's? How do you know that Middendorf  
23 especially wanted to exploit this secret inside edge? Because  
24 he was the SEC reviewing partner on Macy's. His name was going  
25 to be alongside the main engagement partners. He was on the

hook for the success of this inspection. He had a personal interest in its outcome.

If there is any doubt in your mind about whether the participants in this scheme knew full well that what they were doing was wrong, you have another cover-up. Remember that in November 2016 Sweet sent a prediction list, by email of course, called the bank screening analysis. That's Government Exhibit 1067. In January 2017 Whittle asked him to add some of the banks on the stolen January 2017 list to this old prediction list, to the bank screening analysis. Why did he do it?

Whittle told you. He asked Sweet to update the bank screening analysis, to add those additional banks, as a cover so that "if we were ever to do additional procedures," new audit work, after getting this inside information, we would be able to point to an internal analysis.

Point who to it, ladies and gentlemen? "Point the regulator to it, explain why they did it, because explaining to them we had inside information, that was never okay. To point to an internal analysis as to why we were following up and doing additional procedures, whether it be re-reviews or otherwise."

Even if Middendorf wasn't part of this particular cover-up, he was in charge of the whole scheme. He was the boss. What does it tell you that a member of this scheme wanted to cover up what they were doing by manipulating

documents and creating a fake paper trail? That they all knew this was wrong, that they all were working not to get caught.

After Sweet did this, Whittle sent another cover email to Sweet and their partner in crime David Britt thanking Sweet for the hard work over the past few months that led to that updated prediction list. He knew full well that they hadn't done a lick of work on it and it was just update with the stolen information. Another cover-up, another piece from the paper trail. We are not even to the February 2017 list.

I want to pause here for a second. Everything you have heard about January 2017, everything you have heard about what's happened so far in 2017, that makes Middendorf and Wada guilty of the substantive wire fraud count for 2017, already, and we haven't even gotten to February yet.

Let's look at what happened with the February 2017 list. At night on February 2, 2017, Wada texts Holder. "Okay, I have the grocery list. All the things you'll need for the year," another grocery list from someone who lives 1500 miles away. You can see Holder later deleted these texts because, obviously, she too knew this was wrong.

The next day, Friday, February 3rd, Wada and Holder speak in three long calls totaling 90 minutes. It is in one of those calls that Wada discloses PCAOB's complete confidential final inspection list for 2017. He calls her that afternoon with a correction, a follow-up, a comment about the crime he

1 has already committed that day, more information about the  
2 list. Let's look at what he said.

3 (Audio played)

4 He says he looking at his grocery list. Again, ladies  
5 and gentlemen, that makes no sense. He was looking at the  
6 stolen inspection list and he wanted to talk to her about it,  
7 again.

8 Holder got off the phone with Wada and she texted  
9 Sweet: "Please call ASAP," as soon as possible. Then they  
10 spoke for more than half an hour. Sweet took down the list,  
11 the full 2017 final list, on that same manila folder on which  
12 he had written the January 2017 list.

13 Let's look at how the list that Wada shared that day,  
14 that Wada disclosed in breach of his duty, matches up with the  
15 PCAOB's real list. I'm just going to go through a couple of  
16 examples, but you can see, ladies and gentlemen, it matches up  
17 perfectly.

18 Sweet shares the list. He tells Whittle and Britt.  
19 That following Monday Sweet, Whittle, and Middendorf have a  
20 conference call. Middendorf takes down the whole list once  
21 again in his iPhone. Look at the length of this list, ladies  
22 and gentlemen. Look at the keys. There is no reason in the  
23 world for Middendorf not to have said, email it to me, send it  
24 to me.

25 He's on the phone that gets the emails, right? Why

stand there and type dozens and dozens of names? Why go over it like everyone said they did several times to try to get it right? He could have said in one second, email this to me. He could have gotten the email ten seconds later and then looked at this list and talked about it without all that typing. Why did he do that?

You know why. Because every keystroke as he typed these names in, he knew what he was doing was wrong and he didn't want that paper trail. He took down all the names, all the details. Look at how the list in his phone matches up.

He took down extra details, too, not just the names. He took down details like the focus areas and the rationale for Macy's, the engagement that he was the SEC reviewing partner on.

Next to Macy's in Sweet's list, Government Exhibit 655, you see that writing in the brackets. You can see in a draft of the note on Middendorf's phone that appears deleted that it matches up. Net sales, pension assets and liabilities, inventory, vendor allowances, store closures. These were the confidential focus areas and rationale for the very engagement that Middendorf was the SEC reviewing partner on. He took it down in detail.

What does it mean that he took down all these details? He testified that he did it so he could tell his boss what he had learned. But if he actually knew this was wrong, he didn't



1 need to take down these details. He didn't need to take down  
2 the focus area and the rationale. And he wouldn't have sat  
3 down, like he said he did, and compared this list to the  
4 computer system at KPMG and filled in more detail.

5 He did those things, he painstakingly wrote down every  
6 single little detail, because he wanted to use the information.  
7 He wanted to have it all on his phone so he could act on it, so  
8 he could change the outcome, so he could get a better result on  
9 the inspection of the engagement that his name was on and on  
10 all the others that were going to be inspected that he was  
11 ultimately in charge of because he was the head of the national  
12 office.

13 He did those things because, just like every other  
14 time, he planned to use this information. But Laurie Mullen  
15 and the other whistle-blowers got in his way.

16 Before I talk about how the scheme unraveled, let's  
17 make clear Middendorf and Wada are guilty on Count Five for  
18 what they did in 2017. You have overwhelming evidence of the  
19 scheme and of their wrongful intent, their intent to defraud.  
20 And of course more texts, more voicemails across state lines.  
21 Count Five: guilty.

22 After two years of knowingly using stolen PCAOB  
23 information to cheat, Middendorf claims that come February 2017  
24 he was the knight in shining armor that blew the whistle.  
25 That's just not true. The truth is that he dragged his feet

1 until the very last minute, when everyone around him was  
2 freaking out and demanding that this be reported.

3 So why is he now trying to claim that he wanted to  
4 blow the whistle? Why does he want you to believe that in this  
5 story of cheating and corruption that he is wearing the white  
6 hat? Because the truth makes crystal clear he is guilty.

7 Let's look at how the scheme was really discovered,  
8 how it actually unraveled. You may recall after the list comes  
9 in on February 3rd Brian Sweet told Diana Kunz that her audit  
10 was on the list, and she reported it up the chain, her chain of  
11 command: John Rodi, Dave Marino, and Laurie Mullen. The three  
12 of them spoke. They decided that Laurie Mullen would confront  
13 Middendorf.

14 On February 8th she did exactly that. She confronted  
15 him by phone. What did he say on that call? Everything he  
16 could to downplay the information, to try to stop Laurie Mullen  
17 from taking any action. "There were really not a lot of  
18 surprises on the list," he said, minimizing its importance.  
19 "Most of them were in the monitoring program," nothing to see  
20 here, no real news.

21 He said "he couldn't unknow it." In other words, why  
22 bother reporting it? It's too late, I already have the  
23 information in my head. What about his demeanor? "Very calm,  
24 very affable, regular Dave," playing it cool.

25 When Middendorf was asked about all these details,

1 details of that call with Laurie Mullen, all those things that  
2 showed that he was trying to keep the genie in the bottle for  
3 as long as he could, you know what he said about that call,  
4 ladies and gentlemen. Once again, "I don't recall."

5           What did he do after this call where he was very calm,  
6 very affable, very Dave? He stormed into Whittle's office. He  
7 knew the scheme was unraveling. He knew they were caught. He  
8 wasn't affable or calm in that conversation. You heard what he  
9 said: "What the fuck is Brian Sweet doing telling people  
10 they're on the list, telling people they're being inspected?"  
11 Like that, he revealed how he actually felt to his partner in  
12 crime, something he tried to keep from Laurie Mullen.

13           And he wasn't upset that there was a list. Of course  
14 he wasn't. This is now year three of the same scheme. He was  
15 upset, he was furious, that Sweet was going to get them caught.  
16 Does that sound like a man who is just coming to realize that  
17 this was in the gray area, who was still processing what had  
18 happened? Not at all. It's the desperate realization that  
19 they were caught.

20           Laurie Mullen had to follow up with him a couple of  
21 days later, so they spoke on February 10th. Middendorf asked  
22 her in that call, you heard her testimony, what if the PCAOB  
23 wants us to have this? Again trying to minimize what they had  
24 done. He told her he had passed word to Brian Sweet to just  
25 say no thank you if he's offered this kind of information

again.

Think about that, ladies and gentlemen. He didn't tell Laurie Mullen that he had gotten this kind of confidential information before, that he had authorized extensive changes to the workpapers to affect the PCAOB outcome. He didn't tell Laurie Mullen that he had demanded confidential information from Sweet. He lied. He acted like he was putting a stop to something, something that all along, 2015, 2016, and 2017, he had been asking for, he had been receiving, and he had been using, confidential PCAOB information.

And what about the idea that the PCAOB may have wanted them to have this list? It's ridiculous. Even Middendorf admitted on the stand when he was pressed on cross-examination that having the PCAOB's confidential information is wrong. That claim is also ridiculous, but for a different reason.

The PCAOB has a very structured process for notifying firms of inspection. The legal way, the typical way: an email to a particular point person at KPMG, "We plan to commence the following inspection the week of 8/15." Then within KPMG there is a typical process, telling the partners and other leaders of the firm, "We have been notified by the PCAOB of the following inspection."

That's not what this was. If the PCAOB wanted them to have this list, this inside information, it wouldn't be passed from a corrupt insider, it would be sent in an email. But look

1 what happened here. "Please call ASAP," cell-phone-to-cell-  
2 phone call, chicken scratch on a manila folder, notes in an  
3 iPhone. The regulator doesn't want this. It's preposterous.

4 Laurie Mullen twice, twice, pleaded with Middendorf to  
5 report this conduct to the PCAOB. Two of her partners, Dave  
6 Marino and John Rodi, confronted Middendorf's boss. They made  
7 crystal clear: he reports it or they would. So, under a threat  
8 from several KPMG partners that they would report this conduct,  
9 Middendorf reported it to Judge Holmes, KPMG's chief legal  
10 officer. This is not Middendorf blowing the whistle. He was  
11 backed into a corner and he had no way out.

12 Again he tried to minimize. He told Judge Holmes only  
13 about the 2017 list in the first call, revealing only what he  
14 thought he had to. It was only later, when everyone was being  
15 interviewed, when he knew others were talking, that he told  
16 them about his deep involvement with the stolen 2016 list and  
17 the re-reviews.

18 Let's turn back to Count Two, the conspiracy to  
19 defraud the PCAOB. That just means an agreement, an agreement  
20 in this case to commit wire fraud. Agreeing is a separate  
21 crime. So, all the evidence you have already seen of the  
22 scheme is proof of the conspiracy to commit wire fraud.

23 I expect you will hear from Judge Oetken that  
24 conspirators don't have to enter into a spoken agreement. But  
25 that is actually what they did here in 2016. They literally

1 sat around the conference room table and entered into a  
2 criminal agreement. All the coded language and secrecy, that  
3 all tells you they had criminal agreement. What they called a  
4 circle of trust you know is a criminal conspiracy. It's the  
5 same thing.

6 And it doesn't matter that Wada joined the conspiracy  
7 in the fall of 2015, after Middendorf had asked for and  
8 received the 2015 list. People don't have to join conspiracies  
9 at the same time. And it also doesn't matter that they played  
10 different roles or even that they didn't know each other. They  
11 can be, and they certainly were in this case, part of the same  
12 criminal conspiracy. Wada agreed to pass inside confidential  
13 information to Holder, to pass it to KPMG so that it could be  
14 used.

15 Let's look at what he said about the so-called grocery  
16 list in 2017, the inspection list: "All the things you'll need  
17 for the year." That tells you exactly what Wada knew would be  
18 done with this list. He was sharing it so it could be used,  
19 put to use by Holder, Sweet, Middendorf, and everyone else at  
20 KPMG who was in the circle of trust. "All the things you'll  
21 need for the year," for the inspection season.

22 Wada knew that Holder wasn't just putting this secret  
23 confidential list in a drawer and throwing them away. He knew  
24 she was passing them to Sweet. Just a couple of examples.  
25 "Say hi to Sweet for me," he says in January 2016. And Sweet

1 relays to Wada through Holder, "Tell Wada we owe him big. The  
2 beers are on me next time he's in New York." Wada of course  
3 knew this was going to be put to use at KPMG because aside from  
4 all of this, it's the only reason to share it. It's the only  
5 reason to share it, so that it could be used.

6 That's Count Two, ladies and gentlemen, the conspiracy  
7 to commit wire fraud. Middendorf and Wada are both guilty.

8 Why did they do all of this? Why did they engage in  
9 all of the lies and deceit year after year? For a criminal  
10 purpose: to deceive everyone who received and used the PCAOB  
11 inspection reports. That means not just the PCAOB but also  
12 KPMG's main government regulator, the SEC, the same agency that  
13 had been monitoring with dismay KPMG's poor inspection  
14 performance.

15 That brings us to Count One, the fraud on the SEC.  
16 All the proof you have seen in this trial of the core scheme is  
17 proof of this crime too, but it has different elements from  
18 wire fraud. I said at the beginning that fraud on the SEC  
19 doesn't mean taking property or money. It means conspiring, or  
20 agreeing, to impede, impair, obstruct, or defeat, by fraudulent  
21 or dishonest means, the lawful regulatory and enforcement  
22 functions of the SEC.

23 You know, and you have seen throughout this trial,  
24 that the SEC is the government agency charged with making sure  
25 investors get accurate information. As part of that mission

1 they regulate and bring enforcement actions against auditors.  
2 Because auditors are the gatekeepers of the financial markets,  
3 regulating them is an important part of protecting investors,  
4 an important part of what the SEC does.

5 Wes Bricker, the chief accountant of the SEC,  
6 explained this to you too. He told you that the SEC regulates  
7 auditors of public companies directly and indirectly and that  
8 the SEC can bring enforcement actions for violations of PCAOB  
9 rules. Even the defense's own witnesses, when pressed on this  
10 point on cross-examination, had to acknowledge that the SEC  
11 regulates auditors.

12 It is also plain as day, and it was to the defendants,  
13 that the PCAOB inspection results matter to the SEC. You know  
14 that's true because the SEC said it publicly. The chair of the  
15 SEC at the time, Mary Jo White, spoke on this topic and it was  
16 emailed to Middendorf. What did she say that Middendorf  
17 received in this email, Government Exhibit 925? "In the  
18 worrisome column, we still observe too many instances where  
19 companies and their auditors have not discharged their  
20 responsibilities. Recent inspections by the PCAOB have found  
21 significant deficiencies."

22 Middendorf knew full well that the SEC cared about  
23 PCAOB comments. That's what "deficiencies" means, ladies and  
24 gentlemen, you have heard it throughout this trial: significant  
25 comments. Middendorf knew this mattered, that this mattered



1 to the SEC.

2 Tom Whittle told you the same thing. He said it was  
3 important to KPMG that the SEC be satisfied with its  
4 performance on inspections. There is just no real dispute that  
5 the SEC regulates auditors and uses inspection reports, that  
6 they care about the inspection reports. This basic fact was  
7 acknowledged by every single witness who had knowledge on the  
8 subject, including those called by the defense. Even their  
9 hired gun, Paul Atkins, told you that, someone who hasn't been  
10 at the SEC in 11 years.

11 Wes Bricker explained how the SEC critically relies on  
12 PCAOB inspection reports to carry out its job. He told you  
13 they review inspection reports, he said, for a lot of reasons.  
14 First, compliance with SEC rules, PCAOB rules, professional  
15 standards. They also use them to evaluate the performance of  
16 auditors generally and in considering PCAOB rules as well as  
17 their own approval of PCAOB rules and SEC rules. Those were  
18 just examples.

19 You saw how just one group within one office within  
20 the entire SEC uses inspection reports, uses those reports to  
21 regulate and uses those reports to make referrals to other  
22 divisions within the SEC. You may remember this very long and  
23 complicated flowchart. Wes Bricker told you about it and  
24 walked you through it, the path the inspection reports take  
25 just for review by the accounting group within the office of

1 the chief accountant within the SEC. That's Government Exhibit  
2 350, ladies and gentlemen. It shows you just how much use the  
3 SEC made of PCAOB inspection reports.

4 Remember all the offices at the SEC that use PCAOB  
5 inspection reports to carry out the SEC's regulatory and  
6 enforcement functions: two groups within the office of the  
7 chief accountant, the accounting group and the professional  
8 practice group; the division of enforcement; the division of  
9 corporation finance. They all make use of PCAOB inspection  
10 reports. This was literally undisputed by the defense witness  
11 on cross-examination, Paul Atkins, a former SEC commissioner.

12 On top of all that, Middendorf personally met with the  
13 SEC. He personally met with them about inspection results,  
14 with the challenges KPMG had and their performance on  
15 inspections on the ALL issue all throughout 2015 and 2016.  
16 There are lots of calendar entries and there are lots of  
17 agendas in evidence, ladies and gentlemen, and you can look at  
18 them. They show you clearly August 2015, October 2015, two  
19 times in March, lots of meetings in D.C. at SEC headquarters  
20 that Middendorf had to travel to.

21 Remember, we are talking about the head of KPMG's  
22 national office when we are talking about Middendorf. His job  
23 was to deal directly with the SEC. Of course he knew that  
24 PCAOB reports mattered to and were used by the SEC.

25 But if there were any doubt in your mind after all

1 that evidence, let's remember the Come to Jesus meeting. At  
2 the SEC in February 2016, the month before he got the 2016  
3 confidential inspection list, it doesn't get more serious than  
4 being called to the carpet by the chair of the SEC, the person  
5 in the highest position of your main government regulator.

6 Of course he intended for the scheme to interfere with  
7 the SEC's regulatory and enforcement functions. He wanted to  
8 pull the wool over the SEC's eyes, to get the SEC off of his  
9 back, off of KPMG's back, by doing better on inspections, even  
10 if that meant cheating.

11 Wada, an inspections leader at the PCAOB, a regulator,  
12 also knew exactly what he was doing. Numerous PCAOB documents  
13 make clear that PCAOB inspection reports go to the SEC. Take a  
14 look at M245, the inspections manual. That basically told Wada  
15 how to do his job. That document made clear that every single  
16 inspection report would be transmitted to the SEC.

17 Wada was an inspector. He worked for a regulator, a  
18 regulator that was overseen by the SEC, a regulator that  
19 interacted with the SEC regularly. Of course he knew that the  
20 SEC got and used these inspection reports. He wanted to help  
21 himself and get a job in the long run, and that meant helping  
22 KPMG do better on inspection reports for everyone who got them,  
23 for everyone who used them, including the SEC.

24 How else do you know that Middendorf and Wada intended  
25 to defraud the SEC? Because their partners in crime, other

1 members of this conspiracy who you heard from, told you that  
2 they intended to defraud the SEC. Let's look at an example.  
3 Brian Sweet said he intended to defraud the SEC by taking  
4 action to manipulate PCAOB's inspection reports because of the  
5 advance notice that they received, because the SEC uses those  
6 reports in fulfilling their oversight responsibilities.

7           The other members of this conspiracy, including  
8 Middendorf, wanted everyone who used the inspection reports,  
9 including the SEC, which had been breathing down their neck, to  
10 be duped about the firm's quality, to think that it was as good  
11 when no one was looking as it was when they acted on illicit,  
12 stolen confidential information.

13           You know that by having gotten that early warning, by  
14 defeating the design of the PCAOB inspection process, those  
15 resulting inspection reports would be useless to the SEC,  
16 inherently corrupted. With that advance notice, those reports  
17 couldn't do the very thing they were meant to do: give an  
18 accurate assessment of KPMG audit quality that could be relied  
19 on by the SEC.

20           Wes Bricker explained that. The SEC is counting on  
21 PCAOB's inspection program to be operating in the way that it  
22 was designed to operate. And that design, that's on the basis  
23 of using resources to look at just a few engagements, that 50  
24 or so sample of all of KPMG's 700 public company audits. Then  
25 we have the sampling the SEC needs to be able to use that

1 report, a report that's useful on the basis of that inspection  
2 report.

3           The inspection reports that were sent to the SEC, the  
4 inspection reports that KPMG saw, they reiterate that concept.  
5 The reports specifically say, "Inspections are designed and  
6 performed to provide a basis for assessing the degree of  
7 compliance by a firm with applicable requirements related to  
8 auditing issuers." Through their scheme, the defendants in  
9 this case made this representation to the SEC a lie. Bricker  
10 explained how the advance notice undermined the design of the  
11 PCAOB inspection process by making the ultimate reports  
12 unreliable as true reflections of KPMG's audit quality.

13           It's common sense. Advance notice lets the firm focus  
14 on just the few. But the PCAOB is reporting on the firm's  
15 system as a whole. The SEC is counting on their ability to use  
16 these reports to have a sense of the firm's degree of  
17 compliance overall.

18           This is not rocket science, ladies and gentlemen.  
19 Wada, Middendorf, and all their partners in crime corrupted the  
20 inspection process with illegal advance notice that Wada stole  
21 from the PCAOB in breach of his duty. The fact that this  
22 matters to the SEC and affects its work is also just plain  
23 common sense.

24           The harm to the SEC, the interference with its  
25 important regulatory or enforcement functions, that was not

1 just theoretical in this case. It came to pass. Because of  
2 the defendants' scheme, the 2016 report was useless before it  
3 was even issued.

4 The PCAOB had to make new selections to replace those  
5 corrupt inspections of banks, the ones that led to the zero  
6 comments because of all the re-review work. Then the PCAOB had  
7 to perform replacement inspections. That whole process caused  
8 by the defendants' scheme resulted in a delay of the 2016  
9 report by more than a year.

10 This report came out in January of 2019. You know  
11 from all the testimony in the case and the other inspection  
12 reports that they come out typically in the fall of the year  
13 after they are completed. Not this one. This one wasn't  
14 issued until January 2019, more than a year of delay, a long  
15 delay in the SEC obtaining critical data on the audit quality  
16 of one of the biggest auditors in the United States that is  
17 responsible for auditing the financial statements and being the  
18 gatekeeper for over 700 publicly trade companies. The  
19 defendants intended to and did interfere with the SEC's  
20 important functions.

21 That's Count One, ladies and gentlemen, the conspiracy  
22 to defraud the SEC, and both defendants are guilty of it. They  
23 are guilty of every single charge against them.

24 I want to say one word about something called venue.  
25 You will also need to find for each count that something

1 happened in furtherance of the crime in this district. That is  
2 not an issue in this case at all. The Southern District of New  
3 York includes Manhattan. KPMG's office is here in Manhattan.  
4 And you have seen all the conspirators' meetings, emails sent  
5 and received here, phonecalls to and from here, lunches, all of  
6 that happened in or passed through this district.

7 I'm almost done. But before I sit down I want to take  
8 a step back and look at the big picture for just a moment, the  
9 big picture of what the evidence has shown and what the  
10 defenses have been.

11 The only real issue for you to consider with Jeff Wada  
12 is whether he was the source, the tipster, the corrupt insider.  
13 All of the evidence tells you that he was, that he did this for  
14 personal gain, to try to get a job, that fat payday he texted  
15 about. His actions were deliberate, devious, and criminal.  
16 His words speak for themselves. When you are deliberating,  
17 listen again to the voicemails. You will have a computer with  
18 the voicemails on it. Listen to those voicemails, ladies and  
19 gentlemen. They speak volumes about his guilt.

20 The only real issue for you to consider with  
21 Middendorf is whether his participation in this brazen crime  
22 was knowing and intentional. You have seen two important  
23 windows into who Middendorf is. First, Sweet's first week,  
24 when presented with an opportunity to get his hands on a  
25 confidential inspection list stolen from a regulator, to cheat

1 to get ahead, he jumped at it. Get that list. A powerful man  
2 in a powerful position using powerful words, committing a  
3 crime.

4 The second window into who he is you saw when he  
5 stormed into Tom Whittle's office after Laurie Mullen blew the  
6 whistle. He played it cool on the call and then he raged on  
7 his partner in crime: "What the fuck is Brian Sweet doing?"  
8 Those were not the words of someone who didn't realize that  
9 what he was doing was wrong. Those were the words of someone  
10 who had been caught red-handed.

11 Look closely, ladies and gentlemen, at his claim of  
12 not knowing that what he did was wrong. First, put in context  
13 the number of times that he claimed not to remember a  
14 devastating piece of evidence or a damning meeting or a  
15 conversation that showed his guilt. How many times did you  
16 hear him say, "I don't recall"? When faced with incriminating  
17 evidence, that's what you heard. This was no coincidence.  
18 This was a strategy.

19 Every other person who learned about the lists  
20 understood that this was without a doubt absolutely wrong.  
21 Look at who was around David Middendorf when he claimed that he  
22 didn't know what he was doing was wrong: Brian Sweet. He  
23 burned the real list in his backyard barbecue to avoid getting  
24 caught, ladies and gentlemen. And he admitted all of his  
25 crimes. He pled guilty to conspiracy to defraud the PCAOB and



1 conspiracy to defraud the SEC. He knew, as he told you, all  
2 along, every step of the way, that what he was doing was wrong.

3 Tom Whittle admitted his crimes, owned up to what he  
4 did, pled guilty to conspiracy to commit wire fraud and  
5 conspiracy to defraud the SEC, and he told you the same thing:  
6 every step of the way he understood this was wrong. He knew  
7 it.

8 Cindy Holder deleted incriminating text messages,  
9 talked about getting burner phones when the investigation  
10 started. She knew this was wrong.

11 George Hermann. You heard testimony that when he  
12 found out about this in February 2017, he freaked out. He knew  
13 it was wrong.

14 Diana Kunz, John Rodi, and Laurie Mullen each saw how  
15 wrong this was when they first found out. And remember, they  
16 had that reaction when all they understood was that they had  
17 one name on the list, before they knew that Middendorf had the  
18 whole list of 47. When they thought it was just one, they knew  
19 this was wrong.

20 (Continued on next page)

21 MS. KRAMER: They insisted it be reported.

22 And Dave Marino, same reaction: Outrage.  
23 Indignation. Shock. You heard what he said about it. He had  
24 a deep level of concern for the entire firm. He said, we  
25 cannot have the regulator's selections, period. We must do the

1 right thing. There's only one course of action, to  
2 self-report. He said hiding this is unethical and possibly  
3 criminal. It needs to be immediately raised to the Board of  
4 Directors, to the CEO, the Chairman of the firm, and the head  
5 of Legal.

6 He understood immediately exactly how wrong this was.  
7 Every one of these people knew that this was wrong.

8 And they weren't the head of the National Office of  
9 one of the four biggest accounting firms in the world.  
10 Middendorf is asking you to believe that he was right there in  
11 the middle, in the middle of this scheme to obtain and use  
12 confidential information -- not once -- many times, 2015, 2016,  
13 2017, and he's the only person who didn't think this was wrong?

14 He was probably the smartest man in every room he was  
15 in from the beginning to the end of this scheme. But he's  
16 asking you to believe two things that just don't add up: That  
17 he doesn't remember all these key moments in time, when he  
18 remembered and testified about everything else from the same  
19 time period, in great detail. And if that doesn't work, he  
20 wants you to believe that he was oblivious, oblivious when  
21 everyone around him understood exactly how wrong this was.

22 It doesn't add up, ladies and gentlemen. No matter  
23 how much you may want to believe him, it doesn't add up.

24 The evidence in this case has proven to you that this  
25 was wrong from day one.

1           The defendants, David Middendorf and Jeffrey Wada,  
2   they lied, they schemed, and they cheated. They committed a  
3   brazen fraud. And they knew, just like you know, that what  
4   they were doing was wrong. Because of that, both of them are  
5   guilty.

6           Thank you.

7           THE COURT: OK. Can I see counsel at sidebar briefly  
8   just to talk scheduling?

9           (Continued on next page)

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1 (At the sidebar)

2 THE COURT: It is 12:36, and I just wanted to see if  
3 it made more sense to break now or if you want to go to 1?

4 MR. BOXER: I am fine with either of them. I am fine  
5 with going to 1 and getting started. That is fine, unless  
6 somebody else or the jury --

7 THE COURT: It is really up to you. If you are fine  
8 with starting --

9 MR. BOXER: We might as well.

10 THE COURT: OK. We will go to 1.

11 MR. BOXER: Thank you, your Honor.

12 (Continued on next page)

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1 (In open court)

2 THE COURT: OK, folks. We'll go until 1 o'clock, and  
3 then we will break for lunch, as is our usual practice.

4 You have heard the closing argument, or summation,  
5 from the government. You will now hear the closing argument,  
6 at least until 1, the closing argument of counsel for  
7 Mr. Middendorf.

8 Mr. Boxer.

9 MR. BOXER: Thank you, your Honor.

10 May it please the Court, counsel, ladies and gentlemen  
11 of the jury:

12 This is a case that calls for clear, careful,  
13 thoughtful consideration. It is not a case that you should be  
14 influenced by tone, by hostility, or by exaggeration. It  
15 requires a careful view of the evidence.

16 Mr. Middendorf, Dave, worked for 30 years at KPMG.  
17 When asked to pick up and move his family, he did so four  
18 times. He was chosen to serve on KPMG's Board of Directors,  
19 and he was chosen as KPMG's representative on the Special  
20 Advisory Group, or the SAG, to the PCAOB. And in 2014, Dave  
21 was promoted to one of the highest leadership position at the  
22 firm in the National Office.

23 Dave cared deeply about KPMG. He loved the firm. And  
24 he championed significant investments in many programs to  
25 improve audit quality at KPMG.

1 Affable Dave. He was the kind of partner who  
2 regularly met one-on-one with the CO of one of the most  
3 impressive companies in the United States, and impress that  
4 CEO. And, yet, here we are, Dave sitting at defense counsel  
5 table in this courtroom, charged with serious federal crimes,  
6 facing 85 years in jail. It is not only improbable and  
7 nonsensical but it is wrong.

8 Mr. Middendorf did not intend to defraud the SEC or  
9 the PCAOB. What he intended in 2016 was for a review of  
10 workpapers in accordance with auditing rules so KPMG would get  
11 the credit or the comment that it deserved. Period.

12 The government mentioned Mr. Sweet's and Mr. Whittle's  
13 guilty pleas to crimes that Mr. Middendorf is also charged  
14 with, and mentioned it a lot. As they told you, neither  
15 Mr. Sweet nor Mr. Whittle had understood that what they were  
16 doing was a crime. So, it was no coincidence during the trial  
17 that Mr. Sweet and Mr. Whittle were repeatedly asked by the  
18 government if they understood what they were doing was wrong.

19 It would be unfair, and it would be improper, to apply  
20 Mr. Sweet's and Mr. Whittle's view of what they did to Dave's  
21 view of what he did. In fact, there are numerous instances  
22 where Dave has not received and is not even mentioned in  
23 critical emails between or involving Mr. Sweet and Mr. Whittle.  
24 Emails that may establish Mr. Sweet's and Mr. Whittle's  
25 criminal intent. Emails that may explain why they've pleaded

1 guilty to try to avoid a big jail sentence. And emails that  
2 may explain why they met 10 or 20 times with prosecutors before  
3 they testified. But those emails do not establish  
4 Mr. Middendorf's criminal intent. In fact, they evidence that  
5 he was not a member of the charged conspiracy.

6 Looking at all of the evidence demonstrates that  
7 Mr. Middendorf acted in good faith and had no intent to  
8 defraud.

9 2015, the evidence is clear, Brian Sweet stole  
10 information from the PCAOB before he joined KPMG. He said so  
11 himself. No one at KPMG ever asked him to take these  
12 materials. It wasn't by mistake. He purposefully downloaded  
13 PCAOB confidential information onto his own hard drive while  
14 still at the PCAOB so he could use it at KPMG to make himself  
15 look better. This had nothing to do with Dave Middendorf, let  
16 alone any pressure Mr. Sweet tried to sell you that  
17 Mr. Middendorf applied to Mr. Sweet.

18 Included in that data that he stole was a list, a very  
19 hard-to-read list, of the 2015 inspections. It is Government  
20 Exhibit 754A. Along with the list was some of the reasons why  
21 the PCAOB selected those engagements for inspection. That list  
22 was never discussed in Dave's presence, including at the  
23 welcome lunch for Mr. Sweet.

24 Mr. Sweet told Mr. Whittle about that list after their  
25 welcome lunch, when Mr. Whittle stopped by Mr. Sweet's office

1 to see how he was doing. Dave was not there. And notice Mr.  
2 Whittle says yes to the banking selection list in Government  
3 Exhibit 753, but then Mr. Sweet sends a larger list, the entire  
4 list. He gives more.

5 That becomes Mr. Sweet's MO, his regular course of  
6 action, trying to show how important he is to the firm.

7 And then a single one-line forward to Mr. Middendorf,  
8 Government Exhibit 754. No reply by Mr. Middendorf. No  
9 forwarding by Mr. Middendorf. No emails from or to or with  
10 Mr. Middendorf referring to it. Not a single other document in  
11 this case regarding this list and Mr. Middendorf.

12 The government is asking you to conclude that Dave had  
13 specific intent to defraud -- that's the legal requirement,  
14 "specific" -- because he did not respond to this email, because  
15 it could be read to mean that he knew what was coming. That is  
16 not the kind of evidence or argument that supports proof beyond  
17 a reasonable doubt.

18 Consider the other equally plausible inference to be  
19 drawn from that May 5th email, Government Exhibit 754, that  
20 Mr. Middendorf did not give the email much thought at all. And  
21 the government's contention that list gave engagement teams  
22 more time to prepare for their first meeting at PCAOB  
23 inspections comes out of thin air. Remember, at the time of  
24 this email the audits are over. The 45-day documentation  
25 period is over. Some of the inspections have already started.



1 And there was not a single email showing an engagement team  
2 getting advance notice to prepare as a result of that list.

3 You heard the firm already gets three weeks' notice,  
4 which is plenty of time to be prepared, to give a best first  
5 answer. And, by the way, on a conference call, not in a  
6 meeting. The that was exaggerated, the importance of the best  
7 first answer.

8 The person who was in charge of the audit for the past  
9 year doesn't need more time than three weeks to prepare for a  
10 first conference call with the PCAOB. Enough. In talking  
11 about time preparation, there was an important witness the  
12 government left out. Ms. Kunz, Diana Kunz, the auditor from  
13 Chicago who testified. She said she would be fine with less  
14 than three weeks. Her testimony appears now.

15 "I've always had sufficient time to prep."

16 "You have had in some instances less than two to three  
17 weeks to prepare?

18 "Yes.

19 "That was sufficient?

20 "Correct."

21 And ironies of ironies, the notice -- the actual one  
22 notice of an inspection that the government put into evidence,  
23 Government Exhibit 219, it provides four weeks notice.

24 There is more than enough reason why Dave Middendorf  
25 would look at that one-line email and move on with all his

1 other responsibilities.

2 KPMG partners did not need more time to prepare.

3 A few words about Brian Sweet, who comes right at the  
4 beginning of his story. "A superstar." That was Stephanie  
5 Rodriguez's word for him when he was at the PCAOB.

6 And that's how Dave saw him, at first. It turned out  
7 he was something very different. He testified that he was  
8 "pressured" by Mr. Middendorf and by KPMG from day one because  
9 of his welcome lunch with Dave. A very competent, very  
10 experienced, not particularly young accountant on his first day  
11 on the job, he's pressured, he's cowed; he has to do what they  
12 tell him. And now you know he says that having stolen massive  
13 amounts of confidential information from the PCAOB and told  
14 nobody. It's a farce.

15 Mr. Sweet told many, many lies. And the government,  
16 let's be honest, did nothing about it. It didn't rip up his  
17 agreement. That language in the cooperation agreement that the  
18 government likes to point to as the reason why its cooperators  
19 do not have a motive to lie, they have a motive to tell the  
20 truth -- it is understood that the defendant not commit any  
21 further crime -- should the defendant commit any further  
22 crimes, he will thereafter be subject to prosecution for any  
23 criminal violation of which this office has knowledge -- you've  
24 heard of none of that. His agreement was not ripped up. His  
25 bail was not revoked. Nothing happened.

1 Another lie: The location of Mr. Sweet's first day of  
2 lunch with Dave at this restaurant Avra. Now, you may think  
3 this was a small lie, and in some respects I admit it is, but  
4 in fact when you think about it, it is a very significant one.  
5 Government Exhibit 1507 was the picture that was shown to  
6 Mr. Sweet right at the beginning of his testimony. This is the  
7 lunch where on the first day everything was set in motion:  
8 Dave Middendorf lit the match and was responsible for all that  
9 Mr. Sweet did after him, all the pressure he felt.

10 So he described the restaurant. This is it. Yes,  
11 this is it. He points out the booth, and he describes exactly  
12 where they're sit. He's right next to Dave.

13 The problem was that wasn't the Avra where the lunch  
14 occurred, and that wasn't the booth where they were sitting.  
15 Because the government's picture, 1507, was the Avra on  
16 60th Street, but the lunch took place at the Avra on  
17 48th Street. And we know that from the calendar invite from  
18 April 29th, between Lex and Third and 48th, and from the email  
19 from Mr. Mucha about picking up Brian for the lunch. We also  
20 know it from M277, that the two restaurants look very  
21 different.

22 Why is this important? It is important because the  
23 government showed Mr. Sweet the photo of 60th Street, and he  
24 agreed with it, under oath. And then he embellished. Who sat  
25 where? Dave's right in my ear.

1           This proves two things. Mr. Sweet will say what the  
2           government wants him to say. And he'll embellish, add extra,  
3           to the honest facts to make himself valuable, in this case to  
4           the government. He does that when he's at KPMG and he did that  
5           during his testimony.

6           Any of those slides you saw in the government's  
7           summation that has just a quote from Brian Sweet, you should  
8           ignore all of them. If you don't see a document or an email  
9           that proves anything Brian Sweet says, ignore his testimony.  
10          You cannot trust or rely on Mr. Sweet for anything, even where  
11          he went to lunch.

12          And, by the way, it is astounding that the government  
13          is asking you to rely on Brian Sweet for his exact words at  
14          that lunch four years ago. I'll address all the "I don't  
15          recalls" in a moment that they flashed on the screen. But they  
16          suggest to you that Brian Sweet remembers, from four years ago,  
17          who said what and who sat where at a lunch on May 1st, 2015.  
18          And he lied repeatedly on the stand. He even lied about crimes  
19          he hadn't previously admitted to lying about on the stand. I  
20          suggest you can't rely on him for anything.

21          Now, right from the start of his work at KPMG, Brian  
22          Sweet unloads a steady flow of inspection predictions. For  
23          Mr. Sweet, he's trying to show his worth to the firm. In  
24          Mr. Middendorff's mind, it's a steady stream of predictions  
25          based on gossip and best guesses.

1           Let me just stop there for a moment because this is  
2           very important.

3           I can illustrate it with the last few exhibits the  
4           government showed about the SEC. That big flowchart, all the  
5           different uses and places that the PCAOB inspection reports go.  
6           None of that means anything in this case. This case is about  
7           Mr. Middendorf's intent. What he knew. What he didn't know.  
8           And what he intended. There is no evidence that Mr. Middendorf  
9           ever saw that fancy flowchart. The SEC can do all it wants  
10          with PCAOB inspection reports, but unless he knows it, and he  
11          intends to defraud it, it's irrelevant.

12          As I said, a steady stream of predictions based on  
13          gossip and best guesses. You need to separate from your mind  
14          that we all know now that Mr. Sweet had this massive GNF  
15          planning document, with all those tabs, stolen in his laptop,  
16          and he's conniving with that information to send out these  
17          little, little treats of information and gossip. But  
18          Mr. Middendorf doesn't know that. You have to read those  
19          emails from the perspective of someone who's completely  
20          ignorant of what Mr. Sweet has done. Dave had no idea that  
21          before he joined KPMG Brian Sweet stole confidential  
22          information from the PCAOB.

23          And that's why, in email after email, Mr. Sweet  
24          reports gossip or news or his best guesses, as you saw a few  
25          already, and not a single person who received the email -- some

1 of whom are senior to Mr. Middendorf, and I'm sure some of  
2 whom -- no offense -- are smarter than Mr. Middendorf -- nobody  
3 raises her or his hand to say what they just received is wrong.  
4 Nobody calls the hotline. Nobody writes back, hey, maybe we  
5 shouldn't have this, or how did you get this, or what should we  
6 do.

7 If you were looking for evidence of Mr. Middendorf's  
8 criminal intent, these predictions, this gossip, coupled with  
9 no concern raised by any recipient, demonstrates the lack of  
10 it. And I could show you a few examples.

11 Government Exhibit 806, towards the beginning. From  
12 Mr. Sweet to Mr. Middendorf and Mr. Whittle: "I wanted to send  
13 you both a list of what I anticipate will be the most likely  
14 PCAOB banking inspections for 2016."

15 M57, to a whole host of KPMG people. Larry Leva, you  
16 heard testimony, was the head of the international practice.  
17 He oversaw it. "As I reflect back on our meeting last week, I  
18 thought it might be helpful if I followed up with a note  
19 outlining some of the most pressing matters that the PCAOB will  
20 be focused on during its inspections of our SIFI audits."  
21 Systematically important financial institutions.

22 And he gets a whole list of things. "Hot topics.  
23 Will be particularly focused on the following matters." and  
24 Mr. Leva doesn't write back, uh-oh, how does Brian know all  
25 this? He writes back, "Tremendously valuable. Thanks for

1 taking the time."

2 M298. "I've spent quite a bit of time with Palantir.  
3 What I suspect could be the most likely non-banking targets for  
4 potential inspection."

5 How many caveats can you have in one sentence?  
6 "Suspect." Most likely." "For potential." This is the steady  
7 stream that Mr. Middendorf receives, and this is what informs  
8 his understanding of what happens in 2016 and 2017.

9 "I would suggest that these be considered as very good  
10 candidates for our internal coaching or pre-issuance review.  
11 They would have a higher selection likelihood based on my  
12 analysis." He doesn't say he popped up a GNF form on his  
13 computer and did an analysis. They just hired a very  
14 competent, superstar banking auditor from the PCAOB, and  
15 they're getting a download, a dump of everything in this guy's  
16 head, from all his experience, from all the work he's done.  
17 There's nothing wrong with that. There is no fraud. There is  
18 no criminal intent. There is nothing stolen about what's  
19 indicated.

20 And as far as Palantir, remember Judge Holmes was also  
21 aware of the Palantir project, as was the Ethics Committee of  
22 KPMG's board. Mr. Middendorf had a good faith belief that  
23 there was nothing wrong with using well-known, risk-based  
24 flags, like an audit partner who flies in from out of town or a  
25 prior failed inspection, to predict PCAOB inspections even if

1 it cost the firm \$1 million. It went through the highest  
2 levels of the firm.

3 Government Exhibit 824. Again, "I got a call from an  
4 old colleague over the weekend. I would expect," etc. etc.  
5 Mr. Liddy is Mr. Middendorf's boss. David Frew is also very  
6 senior in the National Office. Nobody says, hey, what's the  
7 matter here.

8 All these people, and we counted them up, 47  
9 recipients of these prediction and gossip emails, receive  
10 prediction and gossip emails from Brian Sweet and no one yells  
11 fire. That is because, like Dave, they all understood  
12 Mr. Sweet to be sharing predictions based upon his experience  
13 at the PCAOB or gossip from a lunch with a former colleague.  
14 No one called the hotline or informed Mr. Middendorf that he or  
15 she believed it was wrong to have this information.

16 Would this be a convenient time, your Honor?

17 THE COURT: Yes. It's just about 1 o'clock, folks.

18 We will break for lunch. Is 45 minutes enough, for  
19 lunch, or do you need an hour?

20 (Jurors indicating)

21 THE COURT: You want your hour, OK. All right. We  
22 will compromise. We'll give you 50 minutes, and we'll try to  
23 start a little bit before 2 o'clock, about ten minutes to 2, if  
24 we can.

25 All right? You are not deliberating, of course. We



1 still have to finishing the summations and the charge.

2 Please leave your notepads on your chairs and we'll  
3 start back at 1:50.

4 (Jury not present)

5 THE COURT: You may be seated.

6 Anybody want to talk about scheduling or anything  
7 else?

8 MS. KRAMER: One quick thing, your Honor.

9 Mr. Boxer made reference to Mr. Middendorf facing 85  
10 years in prison. That is obviously an improper thing to put  
11 before the jury. So, you know, I think before we start again  
12 after lunch, we would like an instruction reminding -- I'm  
13 sorry, excuse me.

14 (Pause)

15 MS. KRAMER: I withdraw the request for an instruction  
16 upon conferring.

17 THE COURT: OK.

18 MS. KRAMER: But wanted to raise it and just make sure  
19 it is not going to happen again.

20 MR. BOXER: Your Honor, the 85 years is evidence  
21 through the cooperation agreement of Mr. Whittle, and --

22 THE COURT: But does that translate into -- is it  
23 exactly the same counts?

24 MR. BOXER: It is.

25 THE COURT: OK.

1 MS. MERMELSTEIN: Your Honor, that that is in evidence  
2 does not render it a proper argument. The law could not be  
3 more clear that it is irrelevant for the jury to consider the  
4 punishment the defendant faces. There is no way that defense  
5 counsel thinks that it is OK to argue to the jury about how  
6 much time he is facing.

7 If they want to argue that the cooperators have an  
8 incentive to lie because they're facing a lot of time, that's  
9 totally fine, but that it is in evidence does not render it  
10 permitted for any purpose.

11 And this is black letter law. It could not be less  
12 subject to interpretation that you cannot tell the jury what  
13 sentence the defendant is facing.

14 So, the harm has been done. It has been put out there  
15 improperly. We didn't want to object in realtime and call more  
16 attention to it, but it obviously cannot be mentioned again by  
17 any defense counsel.

18 THE COURT: My instructions will be clear on that  
19 point.

20 And I assume you are not going to mention it again?

21 MR. BOXER: I do not intend to, your Honor. I will  
22 double-check over lunch.

23 MR. WEDDLE: Your Honor, along the same lines, in the  
24 prosecutor's summation, the prosecutor talked about not only  
25 the cost of planning inspections but also the cost for

1 replanning and additional reviews. That evidence was offered  
2 and admitted for purposes of showing the value of the  
3 information taken, to prove that it was property. It was not  
4 offered or admitted for purposes of showing some kind of harm  
5 to the PCAOB. And that's exactly the appeal that the  
6 prosecutor made in the prosecutor's argument and it was  
7 improper.

8 In addition, your Honor, the prosecutor was talking  
9 about Mr. Middendorf, but said that Mr. Middendorf's testimony  
10 that he didn't recall certain things puts the lie to the claim  
11 that he didn't know what he was doing was wrong. And then the  
12 prosecutor said, "Remember, Tom Whittle and Brian Sweet pled  
13 guilty and admitted they knew what they were doing was wrong."  
14 That is a completely improper argument that invites the jury to  
15 infer the defendant's guilt from the fact of a guilty plea by  
16 Tom Whittle and Brian Sweet. And the juxtaposition of those  
17 arguments show exactly the intent of the prosecutor in  
18 appealing to that improper inference and the use of the word  
19 "remember" to combine those two sentences.

20 MR. BOXER: I join in that objection, your Honor.

21 MR. WEDDLE: It is directly contrary to your Honor's  
22 instructions, and we'd ask that the Court add to those  
23 instructions that the jury should disregard the prosecutor's  
24 arguments relating to the guilty pleas of Mr. Whittle and  
25 Mr. Sweet.

1 MR. BOXER: I didn't make a contemporaneous objection,  
2 your Honor. I thought I would just highlight it at that point,  
3 but we agree and we looked at the transcript and lodge the same  
4 objection.

5 MS. KRAMER: May I respond, your Honor?

6 THE COURT: Yes.

7 MS. KRAMER: First on the value of the property point,  
8 it could not have been more clearer that I was talking about  
9 the value of the property when I talked about the cost of the  
10 list. In fact, I think the slide title said "Valuable  
11 Property," or something along those lines. So that argument  
12 was entirely proper.

13 And with respect to the guilty pleas, there was  
14 absolutely nothing improper about my intent, nor what I  
15 actually said. The fact that two co-conspirators in this  
16 scheme recognized that what they did was wrong is relevant. We  
17 are allowed to make arguments just like Mr. Boxer did a few  
18 moments ago when he put up a list of 47 people and said, look,  
19 they didn't know that anything was wrong with this so you can  
20 make an inference about what was in Middendorf's mind.

21 Two of his co-conspirators acknowledged that what they  
22 did was wrong, and that's totally proper argument. There was  
23 absolutely no suggestion on my part that their guilty pleas  
24 show you that Middendorf is guilty of the crime. It was in the  
25 context of discussing the fact that they knew what they were

1 doing was wrong and they had acknowledged it, or to make a  
2 proper argument.

3 MR. WEDDLE: Your Honor, just to add to what I said  
4 before. I agree that in certain parts of the argument the  
5 prosecutor used the cooperators for a proper argument, which is  
6 the one that the prosecutor just articulated. The section of  
7 the argument that I referred to did not do that. It did  
8 something different, which was to invite an inference of guilt  
9 of the charged defendants based on the guilty plea. So both  
10 arguments were in the prosecutor's summation, and the only one  
11 that I am making my objection to is the one that I quoted.

12 THE COURT: I think I understand the argument and I  
13 can see how it could be interpreted that way. However, the  
14 instructions are clear that the guilty pleas cannot be used for  
15 the jury to infer the ultimate guilt of the defendants here,  
16 and I think that that will adequately address that. I will  
17 confirm that it adequately does.

18 MS. KRAMER: Thank you, your Honor.

19 THE COURT: OK. See you soon.

20 (Luncheon recess)  
21  
22  
23  
24  
25

**A F T E R N O O N   S E S S I O N**

1:53 p.m.

(Jury not present)

THE COURT: Everyone ready?

MS. MERMELSTEIN: Yes, your Honor.

MR. BOXER: Yes, your Honor.

THE COURT: OK.

(Jury present)

THE COURT: Please be seated.

MR. BOXER: Shall I continue?

THE COURT: Yes.

MR. BOXER: Thank you, your Honor.

When we broke, I was showing and discussing with you predictions and gossip that had been sent to Mr. Middendorf.

When Mr. Whittle comes to Dave in March 2016 and said that Sweet had some predictions and Whittle would like to have Sweet and maybe others review those workpapers, Dave didn't see a problem. It was after the report release date and before the document completion date. And when he told his boss, Scott Marcello, about it, he also didn't see a problem.

And then a week or so later, Mr. Whittle informed Dave that Mr. Sweet may have information from the PCAOB about some of the inspection selections and he'd like to do the same thing, have a review of the workpapers. And, again, Mr. Middendorf approved of that taking place and he informed

1 his boss, Mr. Marcello.

2           The fact that Dave does not recall the meeting or the  
3 details of who said what, I submit, shows that in fact he is  
4 telling the truth. He heard Whittle and Sweet testify, and he  
5 doesn't argue with portions of their testimony about who said  
6 what and who was responsible for what. Is it plausible that  
7 you remember each exchange by each person at a meeting four  
8 years ago? I suggest that what has the ring of truth, and what  
9 Dave does not excuse or run away from, is the fact that he  
10 authorized the review of the workpapers and that he understood  
11 the information came from someone at the PCAOB. That's his  
12 takeaway and that's what he remembers.

13           If he was lying about a meeting four years ago, do you  
14 think he'd say he did not authorize it, or that he had no idea  
15 it was confidential information? Dave did neither, on direct  
16 or on cross. That has the ring of truth.

17           And why did Dave authorize the rereview? Because he  
18 didn't see any harm to the PCAOB or to anyone else. Because  
19 Dave understood that the audit work was completed, KPMG's audit  
20 opinions had been issued, and all that could be done under the  
21 PCAOB's auditing rules was cleanup of the audit documentation,  
22 the workpapers in the file, which could only help show the  
23 audit work that had already occurred. In fact, the PCAOB very  
24 clearly expressed its view that it did not write inspection  
25 comments because of poor documentation.

1           For example, if you look at M263, in their own  
2 release, they provide that: "In addressing inspection report  
3 criticisms" -- I think this was directed to audit committees --  
4 "firms' responses sometimes characterize the deficiency in  
5 terms of audit documentation. That is, firms sometimes assert  
6 or imply that the firm performed procedures to obtain the  
7 necessary audit evidence and that the criticism arises only  
8 because it did not sufficiently document its procedures. In  
9 the board's view, such assertions should be viewed with  
10 skepticism."

11           And then there was Stephanie Rodriguez's testimony.

12           "The PCAOB does not consider itself to be giving  
13 comments based solely on documentation. It's looking to  
14 whether the underlying work was actually performed?"

15           She said, "Yes."

16           Government Exhibit 152, one of those monthly PCAOB  
17 meetings that Mr. Middendorf attend, Paul Bijou, senior  
18 inspector at the PCAOB: "When hearing documentation, far too  
19 frequently engagement team hear to put something in the  
20 workpapers. We generally don't write comment forms due to a  
21 lack of documentation unless it is egregious. Most times it is  
22 the fact that we did not believe that the information has been  
23 utilized in the audit process."

24           And then, again, Ms. Rodriguez: "So we do not  
25 generally write comments for deficiencies that are solely



1 documentation issues."

2 "But ultimately, your assessment as a PCAOB inspector  
3 is focused on the underlying work, correct?

4 "It's focused on it, yes, ensuring that the audit work  
5 was completed at the report release date."

6 That's what Dave understood when he authorized the  
7 rereviews.

8 And after he authorizes rereviews, as you heard, he  
9 reached out to a few engagement partners so someone from the  
10 National Office can have access to the workpapers. He doesn't  
11 write or send what the government showed you as Government  
12 Exhibit 954 in a very cryptic way.

13 If we look at 951, this is an email exchange with Mat  
14 Mount, and it looks, since Mount writes the first email, that  
15 Dave must have called Mount. And Mount writes back: "our  
16 audit report date was February 22, so I believe we have until  
17 April 7." He has "audit report date" right in the subject  
18 line.

19 And what does Dave do? Does he delete it? Does he  
20 pick up the phone? He emails: "FYI, please send me the name  
21 of the individual that should be invited to the eAudIT file."

22 If he had an intent to somehow defraud the PCAOB,  
23 that's a confession. There is no way that was his intent. He  
24 understood that the PCAOB would not make comments -- would not  
25 issue comments just because of workpapers. And he didn't try

1 to speak cryptically or hide what he was writing about the way  
2 Mr. Whittle did.

3 If Mr. Middendorf really thought he would be creating  
4 evidence of his intent defraud the PCAOB or the SEC, he would  
5 never have left a paper trail like that.

6 And if you want a window into Middendorf's --  
7 Mr. Middendorf's state of mind about what he thought was  
8 permissible and why he thought it was around this time, I  
9 suggest you look at Exhibit M57. It explains why nothing about  
10 what Mr. Middendorf did was cheating.

11 He receives an email from Mr. Sweet reporting on an  
12 inspection that did not go well. And he writes: "Shame on us  
13 that an inspection that went bad previously is likely to go bad  
14 again. If we don't learn from our mistakes we deserve to be in  
15 Part I."

16 His intent was for the workpapers to be as clear as  
17 they could be so they should get the credit they deserve or the  
18 comment they deserve.

19 And, finally, as you could see from the markups to the  
20 workpapers, some of which came into evidence -- this one's  
21 Government Exhibit 1011, page 17 -- and what several witnesses  
22 told you, the rereviews complied with AS 3 and AU 390, and  
23 provided input to the engagement team for it to make any  
24 changes to the workpapers that they thought were appropriate.  
25 The rereviewers were not marking up and writing the workpapers

1 themselves, they were making suggestions, as indicated on the  
2 left side of that exhibit.

3 And Diana Kunz testified: "Right. I had the final  
4 say on what changes we were making."

5 "And isn't it true that" -- if you can just go back?  
6 Thank you.

7 "Isn't it true that all of the changes that were made  
8 to the workpapers complied with the auditing standards,  
9 correct?

10 "Yes.

11 "One of those is AS 3?

12 "Correct."

13 And Mr. Lundelius, he told you that he saw no  
14 violations of auditing rules in the rereview workpapers that he  
15 examined. And there's his testimony to that effect. He is not  
16 cross-examined on that point.

17 And even Mr. Whittle, he testified that you are  
18 permitted to make changes to the workpapers to get credit for  
19 the work the engagement team performed during the audit, and  
20 that's shown right there.

21 "With respect to AS 3, would you agree with me that  
22 you're permitted to make word changes, add descriptions, do  
23 other kinds of things to the workpapers?"

24 He says, "That's correct."

25 "It's a way of getting credit for the work that the

1 team actually did, correct?

2 "That's correct."

3 that's what Mr. Middendorf intended.

4 A few words about Mr. Whittle. Mr. Sweet reports to  
5 Mr. Whittle and they are closely connected. And, yes, he  
6 presented differently than Mr. Sweet, although I must say  
7 that's not saying very much, but he did. Still, some of his  
8 testimony -- some of the little extra he added to the facts are  
9 not credible. Extra without corroboration. That does not  
10 support a finding of proof beyond a reasonable doubt.

11 When there's no document between Mr. Whittle and  
12 Mr. Middendorf and Mr. Whittle just says I told him so, that is  
13 not proof beyond a reasonable doubt.

14 For example, he says he implicitly instructed  
15 Mr. Sweet to steal PCAOB confidential information. It is not a  
16 document. It is not in writing. It wasn't even orally said.  
17 He said it was implicit. That doesn't sound like evidence to  
18 me.

19 Mr. Whittle said he didn't view some of what Mr. Sweet  
20 wrote as predictions. But he was closer to Mr. Sweet than  
21 Mr. Middendorf. He had emails with Mr. Sweet that did not  
22 include Mr. Middendorf.

23 And, remember, Dave had a lot more responsibilities  
24 than Mr. Whittle. That is part of the big picture, the context  
25 that you need to appreciate to assess what Mr. Middendorf did

1 and did not know. Dave had many, many other things he was  
2 focused on besides Brian Sweet or Tom Whittle.

3 I showed you during the trial Exhibit M306, showing  
4 all the audit quality efforts that Mr. Middendorf championed.  
5 You start at the very bottom, the home plate of the baseball  
6 field. It says, "Higher Audit Quality." It doesn't say  
7 inspections. And it continues to move out from different  
8 programs that Mr. Middendorf was involved in when he was  
9 responsible for them.

10 You also saw evidence of his standing meetings and his  
11 various direct reports. And that's in M53, M286, and M287.  
12 And all the highlighted names are people he spoke with  
13 regularly and reported to him regularly.

14 And then M290 is the org chart we put into evidence.  
15 It's not a circle with five or six faces and those are the only  
16 relevant people in Dave Middendorf's world. Far from it. He  
17 had a lot of responsibilities and groups that he oversaw and a  
18 lot of things to do. It is not surprising that he's not as  
19 knowledgeable about what Mr. Sweet is doing as Mr. Whittle is.

20 The government said in their summation that Dave  
21 didn't care about inspection results. He didn't say that. He  
22 said, I care. I would like to have fewer comments from the  
23 PCAOB. I would think anybody would. But it wasn't his central  
24 focus. It was one of several things he focused on.

25 And also consider this. If you review any of the

1 inspection reports in your deliberations, notice there's  
2 language that makes very clear from the PCAOB that they are not  
3 to be considered report cards on audit quality. Because they  
4 are risk-based, they make very clear that they are assessing  
5 the riskiest engagements and it is not a fair assessment of the  
6 overall audit quality of the firm. Dave was focused on the  
7 overall audit quality. Inspections was one piece, and a not  
8 particularly dominating piece, of what he was focused on.

9 As I said, Dave had a lot going on, a lot more than  
10 Tom Whittle's group. And Mr. Whittle writes plenty of emails  
11 to Dave -- they did not sit on the same floor at any time --  
12 including about things Whittle told you he said he believed  
13 were wrong. Like the emails about who were the engagement  
14 partners for some of the 2016 rereviews. You should not rely  
15 for proof beyond a reasonable doubt on testimony of any of the  
16 blue slides that were up there during the government's  
17 summation where it's just words. It is not proof beyond a  
18 reasonable doubt. He knows how to email Dave. He emails him  
19 when he needs him. And when there is no corroboration, it is  
20 not proof.

21 The end of 2016, more predictions arrive from Brian  
22 Sweet. This is the bank screening analysis from November.

23 "Dave - Are there other actions you believe we should  
24 take? For instance, should we discuss the analysis with Kevin  
25 and Laurie?" Kevin O'Hara and Laurie Mullen. And it goes on

1 to describe as background how they started with the data the  
2 firm submitted to the PCAOB at the end of September, looking  
3 for anomalies. There is no indication in there that it is  
4 based on something he stole and something confidential.

5 And then additional predictions come from Sweet in  
6 January 2017, including about Raymond James Financial, which  
7 was in M316.

8 And you heard quite a bit about this in the  
9 government's summation. Dave spoke with Mr. Whittle on  
10 January 10th about what he understood were Mr. Sweet's  
11 predictions for 2017, and he put them on his phone. Does that  
12 sound like the behavior of a conspirator?

13 As far as Dave knew, nothing was done regarding those  
14 predictions. There was Citi, where Brian Sweet was already  
15 embedded there. There was Charter Communications, where  
16 Mr. Whittle said the engagement partner was all set and then  
17 later on came back for resources. As far as Macy\*s, Joe Lynch,  
18 a former PCAOB employee, had already been sent out there in  
19 2016, and Mr. Middendorf understood that he would be back out  
20 again. And for Valero, Cindy Holder had already been contacted  
21 by the engagement team.

22 The last exhibit the government introduced during the  
23 trial, Government Exhibit 1145, is in fact inconsistent with  
24 Mr. Whittle's own testimony about this period of time. He  
25 testified about nothing relating to Scott Henderson. He didn't

1 say anything about the subject of this email. The government  
2 had the opportunity to ask him those questions if it wanted to.  
3 And mentioning Dave in the email, Mr. Whittle also said nothing  
4 about that.

5 And don't accept this argument that what Mr. Sweet  
6 shared in January of 2017 was more than just predictions.  
7 Remember Mr. Whittle's testimony when he actually got the list  
8 the next month. He said he was shocked when he received the  
9 full list from Brian Sweet on February 3rd, and that the  
10 February 3rd information was totally different from what  
11 Mr. Sweet had said on January 10th. In fact, I think  
12 Mr. Whittle testified that he knew the actual list would be  
13 different from what he called the preliminary list in January.  
14 He's shocked. His knowledge that it would be different in a  
15 month, that's predictions. That's describing something that  
16 happened the month before, that is a prediction, there is  
17 uncertainty. Nobody has shock if they have a preliminary list  
18 and then a month later they get the real list.

19 And in the evening on February 6th, 2017, when  
20 Mr. Sweet informed Dave that he had all of the audits that the  
21 PCAOB was going to inspect later that year, Dave did react  
22 differently, he reacted differently than when he had received  
23 predictions. At that time the audits were ongoing, the audit  
24 opinions had not yet been issued, and Mr. Sweet had the list of  
25 upcoming inspections. And so Mr. Middendorf, on that call,



1 instructed Mr. Sweet and Mr. Whittle that nothing should be  
2 done until he conferred with his boss. And the next day he  
3 did. The government made no mention of that fact.

4 He also spoke that next day to two of his direct  
5 reports about the list, George Hermann, whom Dave understood  
6 had not known about it, and Laurie Mullen, who knew about it  
7 before Dave did. Two people who certainly raised their hand to  
8 Dave and expressed very clearly their concern and anger about  
9 the list.

10 And when Ms. Mullen told Dave that Mr. Sweet had  
11 reached out to Ms. Kunz and informed her that her engagement  
12 was on the 2017 inspection list, yes, Dave was furious, and  
13 instructed Mr. Whittle to tell Mr. Sweet to stop, but not  
14 because they were found out, because he had the list and he had  
15 instructed that nothing was to be done with it until he heard  
16 back from his boss. It is not a conspiracy that you are angry  
17 that somebody is breaking trust when you tell your boss and  
18 your two direct reports about the list. Where does that  
19 conspiracy go from that point in time?

20 It's the wrong inference to draw from Dave's anger.  
21 Dave was angry because Mr. Sweet didn't listen to him, and he  
22 didn't think it was appropriate.

23 Dave spoke to Laurie Mullen again on February 10th,  
24 when Ms. Mullen said that she was going to meet with Marcello.  
25 On the following Monday, Dave responded, "Fine." Nothing was

1 being hidden. And then on February 13th, after his meeting,  
2 Mr. Marcello informed Dave that he was going to report the list  
3 to Judge Holmes, and Dave agreed.

4 I don't understand what the government is contending,  
5 that Mr. Middendorf thought he was a Whittle blower, but I'm  
6 telling you now that's not our contention. He took the  
7 information to his boss. There were conversations during that  
8 week. Without a doubt, the people in Chicago were very upset  
9 about it. They demanded to see Mr. Marcello on that Monday.  
10 It's obvious the decision is in the lap of Dave's boss. And  
11 after that meeting Mr. Marcello calls Mr. Middendorf and said  
12 we're reporting it to Judge Holmes, and Dave agrees. It is not  
13 a whistleblower, but it's also not somebody that is a part of  
14 the conspiracy to use or to make any use of that information.

15 By the way, remember, it was Mr. Marino who had said  
16 what Scott Marcello had said about receipt of the 2017 list.  
17 Maybe the PCAOB wants us to have it. That's what Mr. Marcello  
18 said, not Mr. Middendorf.

19 And where do you think he got that idea from? His  
20 meetings with Mr. Hanson. Remember, he handed over an agenda,  
21 a draft agenda, at each one of those meetings before the board  
22 meetings. I don't think it indicates anything about a  
23 conspiracy that Mr. Marcello had that reaction given those  
24 meetings he had with Mr. Hanson, but I'll come to that soon.

25 On February 14th, Mr. Middendorf and Scott Marcello

1 reported to Judge Holmes. And the very next day, on  
2 February 15th, Dave was interviewed by a KPMG lawyer, Mark  
3 Rubino. Mr. Middendorf told Mr. Rubino everything he knew  
4 about the 2017 list. And he also told him about the  
5 information they had received in 2016. He didn't hide that.  
6 And he understood from Mr. Rubino's reaction that he was the  
7 first person to mention it to Mr. Rubino.

8 And he voluntarily turned over his cell phone to  
9 Mr. Rubino. Mr. Rubino asked Dave to produce the list of  
10 companies he received from Mr. Sweet -- and that's Government  
11 Exhibit 1144 -- and Dave did so. And we'll talk about the cell  
12 phone in a little more detail. But recall what Mr. Greenwood  
13 said about the content of Mr. Middendorf's cell phone:

14 "That tells you that a note was created in the phone  
15 on that date and time, correct?

16 "Yes.

17 "It says nothing at all about what content was in that  
18 notes file when it was created, correct?

19 "Yes.

20 "The note could have changed entirely?

21 "Yes, it is possible."

22 There is no way to tell -- a little more.

23 "In your direct examination today, you were asked  
24 about the rows on the Cellebrite report.

25 "Those two rows, they have the word 'deleted'

1 appearing in the right-hand column, correct?

2 "Yes.

3 "Therefore, they have no data appearing in the  
4 left-hand column where we would see creation or modified data?

5 "Correct.

6 "So we have no idea at all when these notes were  
7 created?

8 "Correct.

9 "We have no idea when they were modified or if they  
10 were mortified?

11 "Correct.

12 "When they were deleted or if in fact they were even  
13 actively deleted by Mr. Middendorf?

14 "Correct."

15 There is no way to tell what appeared in the note when  
16 it was created on January 10, 2017. And there is no way to  
17 tell if Dave deleted anything or even overwrote anything  
18 previously written.

19 And by the way, Dave was honest about that. He said  
20 he didn't recall if he typed over the initial list from January  
21 or if he deleted or replaced the initial list. He had kept and  
22 he turned over the full list of names to Mr. Rubino.

23 Does all of this sound like someone who has an intent  
24 to defraud? Right from the outset, Mr. Sweet lied to  
25 Mr. Rubino and KPMG's outside counsel. He also lied to

1 Mr. Whittle when he was confronted on February 8th about  
2 reaching out to Diana Kunz. And Mr. Whittle lied, too, to  
3 KPMG's lawyers. Mr. Middendorf answered the questions he was  
4 asked, and informed Mr. Rubino right from the start not only  
5 about the list from 2017 but also the information he had in  
6 2016. As you heard, he told Mr. Rubino about 2016, "That was  
7 probably poor judgment on my part."

8 I now want to address a few general topics outside the  
9 chronology.

10 The first one is the SEC.

11 And as I mentioned before lunch, the focus is what  
12 Dave intended, what's his state of mind? A fancy internal  
13 flowchart doesn't prove it. The SEC, let alone defeating an  
14 SEC lawful function, was not even a consideration of  
15 Mr. Middendorf's, and for good reason. Dave spoke with  
16 Mr. Bricker, the SEC Chief Accountant, about particular  
17 accounting and auditing issues. It was a relationship of  
18 consultation with and advice by the SEC. It was completely  
19 separate from the PCAOB inspection process. You saw the  
20 meeting invites and agendas, Government Exhibit 300 and 301.

21 300 -- if we could just go back a second. "I would be  
22 happy to give you my views on the allowance for loan losses  
23 issues I am observing. Dave."

24 301. The agenda. "KPMG's response to the related  
25 audit challenge. Methodology governance, process level

controls, review controls over ALL estimate."

These were substantive accounting and auditing issues. Had nothing to do with PCAOB inspection reports or inspection comments.

And even assuming that Mr. Middendorf knew the SEC received the PCAOB inspection reports, it was on the agenda for that February 9th meeting with the Chairwoman of the SEC. There was no evidence to support an understanding by Mr. Middendorf that somehow the SEC was using the inspection reports as part of some lawful function. So, for example, you heard about the Rule 4004 reports. Those are reports the PCAOB sends to the SEC when it sees something in inspection. That would be evidence of how the SEC might use PCAOB inspection reports.

But the thing about the 4004 reports were, you heard evidence and saw the reports, that those addressed issues about the issuer, about KPMG's clients. Government -- Defense Exhibit M207, for example, concerning the financial statements of the issuer. So something comes up in an inspection and the PCAOB sees something related to the issuer's accounting, they could send a 4004 report to the SEC but that's about the issuer.

The other topic that comes up in these reports is about auditor independence. Maybe the auditing firm is representing two people to the same -- related to a transaction

1 or they have subsidiaries and they may not be independent  
2 enough to sign an audit opinion. It has nothing to do with  
3 inspection results or comments.

4 And then there was Wes Bricker's testimony on this  
5 subject. I submit to you it was completely incomprehensible.  
6 If we look at an example of it on page 346 of the transcript:  
7 "So if a firm had improper notice of the fact that the PCAOB  
8 was going to inspect a particular audit and they got that  
9 notice during the 45-day period and made changes to the  
10 workpapers, even if they complied with AS 3" -- so kind of lays  
11 out what happened here -- "would you be able to rely on the  
12 inspection report's assessment about the quality of the audit?

13 "No.

14 "Why not?

15 "Because the documentation reflects the auditor's  
16 judgments and representations about the work that was  
17 performed, and so it's the basis for the PCAOB's review of that  
18 work and then summarizing whether the firm generally has a  
19 system and a set of tools and methodology to do its work on all  
20 of its engagements."

21 It means -- to me it is gobbledygook. It means  
22 nothing. It should be a simple question and a simple answer.  
23 What lawful function of the SEC was impeded or defeated by the  
24 conduct here? And we get that, from the Chief Accountant, the  
25 one who is supposed to know.

1 And even more importantly, Mr. Bricker's own process  
2 manual and the SEC training manual for PCAOB inspectors both  
3 make clear that issues about auditors belong to the PCAOB.

4 So first in M206: "The goal of the review is to  
5 identify potential issuer issues, and therefore the SEC review  
6 team" -- I inserted the word "SEC", that's who it is speaking  
7 to -- "should avoid reporting matters that appear to be solely  
8 misapplication by the auditor of PCAOB standards."

9 Then in Government Exhibit 311, from the SEC Division  
10 of Corporate Finance, a training program of PCAOB inspectors:  
11 "Of course, the PCAOB and the SEC focus in different areas.  
12 You are focused on the auditor, while we are focused on the  
13 company and the disclosures they provide."

14 The government didn't display those exhibits during  
15 their summation, but they show clearly that the SEC is focused  
16 on the companies, the clients, the issuers, and there was no  
17 reason for Mr. Middendorf, who is sitting down with the Chief  
18 Accountant about accounting issues, substantive accounting  
19 issues, for him to think that by authorizing the rereview in  
20 2016 he's impeding some lawful function of the SEC. No less  
21 when the SEC Chief Accountant can't in plain English describe  
22 what that lawful function is.

23 And, finally, you heard the testimony of Paul Atkins,  
24 a former commissioner of the SEC, and a commissioner at the  
25 time the PCAOB was established. And he explained how as



Commissioner he was not focused on PCAOB reports.

"We looked during my first couple of years. Those were the beginning years of the PCAOB. And in fact I demanded that we have a public hearing."

You heard about that.

"In connection with that role, did you ever review a single firm's PCAOB inspection report?"

"No."

"When you were an SEC commissioner, did you ever review a single firm's inspection report in connection with your appointment of board members?"

"No."

Now, the government is saying -- Mr. Atkins was a commissioner until 2008 -- how is a former commissioner of the SEC supposed to know today what functions the SEC does with PCAOB inspection reports? And my question is if he doesn't know, if he can't know and he's in the industry, how is Mr. Middendorf supposed to know, if it is that secret? I think the answer is he does know, Mr. Atkins. He was a commissioner, and he explained to you what use and limited use the SEC had with PCAOB inspection reports.

Dave had no reason to think in 2016 that a review of workpapers, after the audits were over and after KPMG had sent out its opinion letters, which accompanied the issuer's financial statement to shareholders, which is what the SEC is

1 principally focused on, would impede or defeat a function of  
2 the SEC.

3           Next general topic: Duty.

4           The Judge will instruct you about the law, and I will  
5 not say anything about those instructions other than to say  
6 you'll hear an instruction about a duty, a duty that's  
7 required, and it must be breached by an action or a failure to  
8 act.

9           You will hear instructions from the Judge about  
10 embezzlement.

11           Mr. Middendorf did not owe a duty to the PCAOB. He  
12 did not work there. He wasn't bound by EC9 as far as any  
13 information or list of inspections you heard about during the  
14 trial, and he did not embezzle anything from the PCAOB.

15           Even the SAG certification Mr. Middendorf signed,  
16 Government Exhibit 29, only applied to information he learned  
17 in the SAG. It had nothing to do with PCAOB inspection reports  
18 or inspection lists. Recall that the SAG representatives from  
19 all the accounting firms sat. That certification does not  
20 create a duty on the part of Mr. Middendorf with respect to the  
21 inspections.

22           And there is the testimony from and about Jay Hanson.  
23 Now, the PCAOB is the supposed victim in this case, and we're  
24 the only ones who called a board member from the PCAOB. We did  
25 not do so to blame the alleged victim. That's the way for the

1 government to avoid acknowledging the importance of  
2 Mr. Hanson's testimony. In fact, Mr. Hanson's testimony  
3 establishes a critical fact.

4 Starting in December of 2014, Dave is the national  
5 managing partner for six months. Mr. Hanson meets with  
6 Mr. Middendorf and Mr. Liddy and later Mr. Marcello -- if you  
7 look at M13, it is the very first meeting invitation -- at a  
8 hotel in Washington, without Mr. Hanson telling his staff or  
9 his fellow board members. And at those meetings he hands draft  
10 agendas to Mr. Middendorf so KPMG will be well prepared at the  
11 PCAOB board meetings. Make no mistake about it, those board  
12 meetings are important. You heard who attends from KPMG, the  
13 highest levels of the firm, and the highest levels of the  
14 PCAOB, including from the firm the Chairwoman and Judge Holmes,  
15 the head of compliance.

16 And KPMG would take that draft agenda, the same people  
17 who were attending the board meetings, and they used the  
18 information from Mr. Hanson to be better prepared at the board  
19 meetings. I showed you the example, it is M77, for the talking  
20 points about HBOS and the Belfast matter.

21 Mr. Hanson hands that to Mr. Middendorf and  
22 Mr. Marcello. They bring it back to senior leadership, and  
23 they are advised of the talking points for the meeting that  
24 occurs a few days later and they are better prepared to address  
25 those issues.

1 Mr. Hanson, and here's why he's critical. A PCAOB  
2 board member told Dave that PCAOB inspections are unfair. He  
3 used the expression "Gotcha." And he said that the inspections  
4 team would pick firms to have a turn in their box, take turns  
5 who they would focus on.

6 And, by the way, the facts corroborate that there were  
7 peaks and valleys for the Big Four firms. We have that in  
8 M210. And you can see, as we go across, PwC is the highest,  
9 then it becomes Ernst & Young, and then it becomes KPMG.

10 This is critical because it explains Mr. Middendorf's  
11 understanding of the PCAOB. He authorizes the rereviews  
12 because, following AS 3, it would make the workpapers clearer,  
13 so KPMG would get the credit or comment it deserves.

14 And the government says he's rehearsed that answer.  
15 Nonsense. He has three private meetings and one private  
16 telephone call with two PCAOB board members, with his boss,  
17 during which the board members tell them that the inspections  
18 are unfair, are a game of gotcha. And that's why Dave, in  
19 March of 2016, approved the rereview, to be as well prepared as  
20 possible without changing any audit work, so the inspections  
21 would be fair.

22 Next I want to point out a few arguments the  
23 government has made that I think are unfair.

24 First, the cost to the PCAOB for the 2016  
25 reinspections.

1           There was no real cost to the PCAOB for those  
2       reinspections. The data that was used to calculate a cost was  
3       for all salaried employees getting paid that money whether they  
4       worked on that project or did something else. There was no  
5       overtime. And it was based on planning hours, which are just  
6       that, planning in the future, what they expect will happen.  
7       And, of course, always in four- or eight-hour increments.  
8       These were estimates for plans, and they weren't additional or  
9       extra cost or salary that the PCAOB had to pay.

10           There is no evidence in the record of any work  
11       actually performed on those reinspections, let alone the cost  
12       of them.

13           (Continued on next page)

1           The word "cost," as you heard, was put into the table  
2 by the government.

3           As to this notion that the reinspection in 2016  
4 somehow shows that the re-reviews were successful, Stephanie  
5 Rodriguez showed that you can't compare the initial 11-bank  
6 2016 selections to the 10-bank selections in the reinspection.  
7 The selection process was the same, but in terms of the size of  
8 the issuers, revenue, for example, was there any effort to make  
9 those numbers comparable? He said, "I don't know if the  
10 banking team was involved in that. I'm not sure."

11           There was also no effort to use the same inspectors.  
12 In other words, it's apples and oranges which banks, which  
13 inspectors, how big a bank, what issues they might have. To  
14 try to compare from the initial inspection after the re-review  
15 to the reinspection I'll call it and that bar graph that went  
16 from zero to 6 for the banks, there is no real evidence in the  
17 record for you to make that assessment. You can't know what  
18 led to the 2016 results.

19           By the way, Brian Sweet, there is evidence for that  
20 reinspection of those 10 banks. He was the former boss of one  
21 of the inspectors, and two of the inspectors on those  
22 reinspections -- excuse me. On the initial inspections, on the  
23 2016 one that were rereviewed, Brian Sweet was the boss of one  
24 of the inspectors, and two of those inspectors had sent their  
25 résumés to Mr. Sweet looking for a job at KPMG, John Lee and

1 Jeff Lutz. What led to the 10 re-reviewed 2016 results?

2 There's no evidence of it.

3 Delay. Any delay in the 2016 inspection report was  
4 caused by PCAOB. They took an extra year than ordinary, nicely  
5 timed right before the start of this trial. The government  
6 admitted that the 2015 inspections weren't improved by anything  
7 it alleged had occurred

8 This Come to Jesus meeting at the SEC where the SEC  
9 discussed KPMG's inspection performance apparently. Today the  
10 government said KPMG was chastised by the SEC for its poor  
11 inspection reports at this meeting with the chairwoman. That's  
12 an outrageous statement and it should color your view of what  
13 they have to say. There is absolutely no evidence from anybody  
14 who attended that meeting other than Mr. Middendorf.

15 Mr. Bricker didn't attend. They didn't call a single  
16 witness from the SEC who was at the meeting. A 30-minute meet-  
17 and-greet Mr. Middendorf described it as, where the SEC  
18 insulted the chairwoman for taking her time for an initial  
19 meeting. And the government points to lengthy talking points,  
20 a talking point about inspections and says that establishes  
21 that it was spoken at this Come to Jesus meeting. There is no  
22 evidence of that.

23 You would learn that KPMG has the least number of  
24 restatements among the Big Four. Our clients really cared  
25 about and what the SEC really cared about. As you heard, the

1 public receives the PCAOB inspection reports anonymously. The  
2 SEC's mission is to protect those shareholders. Why would they  
3 have an intent to defeat an SEC function for a common  
4 inspection report that is made public almost two years later  
5 and that the shareholders will never know if it concerns his or  
6 her shares?

7 Similarly, the comparison chart that the government  
8 put in, first they did it with the number of comments which  
9 showed KPMG with the most, 2016. It was their choice to put in  
10 six accounting firms, put in the Big Four and the Big Two.  
11 That was their choice. Then, when we had it as a percentage,  
12 it showed a different result. Even for 2016 BDO had more. In  
13 2015 BDO had more, Grant Thornton had more.

14 Circle of trust, you heard that today. There is no  
15 evidence that Dave knew of that term. Tom Whittle also never  
16 heard it. It shouldn't be applied to Dave's knowledge and  
17 intent.

18 Let me say a few words about Dave's testimony. You  
19 heard his testimony. He was not evasive. He did not try to  
20 dodge questions. He was clear. He was straightforward. I  
21 submit that he told the truth. When asked repeatedly if he  
22 knew in 2016 that Mr. Sweet had shared confidential PCAOB  
23 information, Dave repeatedly acknowledged that he knew.

24 When asked about his cell phone, he explained how he  
25 took down what Mr. Whittle said on January 10 in a Notes file



1 and that he wasn't sure if he overwrote or deleted the note and  
2 typed the inspection list on top of it. The fact is he saved  
3 the list and sent it to Mr. Rubino. Compare that to Brian  
4 Sweet, who burned his papers in a barbecue.

5 In one particularly direct moment, Mr. Middendorf  
6 discussed his conduct in general. That was at page 2865, lines  
7 9 to 19. He said, "I don't believe what I did was wrong. But  
8 certainly in hindsight I look back on the fact that we had  
9 confidential PCAOB information that we used and should not have  
10 done that. I was focused on what you could do as an auditor,  
11 and following the standards did not seem to be wrong. I was 30  
12 years with KPMG. I dedicated my life to the firm. My family  
13 sacrificed for the firm. So it was not driven by I thought I  
14 was doing something wrong. I thought it was probably  
15 stretching the limits in a gray area, but not something that I  
16 did wrong."

17 I suggest, ladies and gentlemen, that that is truthful  
18 and does have the ring of truth. He did not have an intent to  
19 commit fraud. He did not think what he was doing was wrong.  
20 He thought he complied with the rules.

21 One other thing. The government during its  
22 questioning of Mr. Middendorf pointed out that six days before  
23 he and Mr. Marcello reported their February 6th conversation  
24 with Judge Holmes, and they argued that again today. Those six  
25 days are not a basis to conclude that Dave had a specific

1 intent to defraud.

2 The next day, February 7th, Dave reported his  
3 conversation with Mr. Sweet and Mr. Whittle to his boss. That  
4 day he also shared the existence of the list with Mr. Hermann,  
5 which Dave understood was news to Mr. Hermann. He also  
6 discussed it that day with Laurie Mullen. Mr. Whittle also  
7 acknowledged at the end of the call with Mr. Sweet on February  
8 6th Dave made it clear that nothing was to be done with the  
9 list until he spoke to his boss.

10 That behavior is not behavior of criminal intent. You  
11 can take issue that he didn't yell fire himself that week, he  
12 reported it to his boss and he left it in his boss's lap,  
13 that's fine. But it is not evidence of his intent to commit  
14 fraud.

15 A few comments about motive. I think I mentioned this  
16 in my opening statement. Why would Mr. Middendorf commit the  
17 crimes that the government says he committed? It's very  
18 important that when you evaluate the evidence you take Dave's  
19 perspective.

20 He worked for 30 years at KPMG, his entire  
21 professional career. He spent his entire career committed to  
22 the profession of public accounting and to KPMG. He did not  
23 receive any money for personal benefit. He was not worried  
24 about KPMG losing clients. And after 30 years he throws it all  
25 away for no money, for no profit, all because he wants to avoid

1 a few comments in PCAOB inspection reports? You heard he said  
2 that he used poor judgment. But there was no motive for him to  
3 commit fraud.

4 I want to conclude with two pieces of evidence that I  
5 think tell a lot about why the government has not proven Mr.  
6 Middendorf's guilt beyond a reasonable doubt. The first is  
7 Government Exhibit 948. That is the one about the smoke screen  
8 re-reviews.

9 As you heard, "David" is not Dave. That's David  
10 Britt. Apparently Mr. Whittle and Mr. Sweet added four  
11 engagements to the re-reviews, so there would be a few that  
12 were not later inspected by the PCAOB. That is a clear intent  
13 to deceive. That's adding four reviews so that if someone  
14 finds out about what was done, or to prevent someone from  
15 finding out what was done. So not all of the ones that were  
16 reviewed were inspected. There is not a single document or  
17 email connecting Mr. Middendorf to these four smoke screen  
18 re-reviews.

19 Similarly, Government Exhibit 1076. That's the second  
20 round of the bank screening risk assessment analysis. Unlike  
21 the one in November I showed you a few minutes ago, this is the  
22 one where Mr. Whittle said he added or asked Brian to add a few  
23 engagements that really didn't belong on the list but were  
24 added in advance in case it turned out many of them were  
25 inspected so they didn't score a hundred percent off the bank

1 screening analysis. Not a single email or document connects  
2 this to Mr. Middendorf.

3           These exhibits camouflage making false entries in  
4 documents to hide behavior are a window into criminal intent.  
5 They are there in writing for Mr. Whittle and Mr. Sweet, but  
6 not for Dave. Maybe Tom Whittle knew in January 2017 that it  
7 was a list, but Dave Middendorf didn't know that. To him they  
8 were predictions, like the steady flow the firm had received  
9 from Mr. Sweet. And on Government Exhibit 1076, the real  
10 smoking gun of intent to defraud, Dave Middendorf is nowhere on  
11 it. If you find yourself comparing Mr. Whittle's conduct to  
12 Mr. Middendorf's conduct, I encourage you to look at Government  
13 Exhibits 948 and 1076.

14           Some final thoughts. Nobody you heard testify thought  
15 they were committing a crime. I said at the outset of the  
16 trial a mistake, maybe; poor judgment or even negligence, okay.  
17 A mistake and poor judgment has already cost Dave tremendously.  
18 But the specific intent, that Dave specifically intended to  
19 defeat a function of the SEC and to defraud the PCAOB beyond a  
20 reasonable doubt? No way.

21           Just because they represent the government, just  
22 because they say it in a loud voice and use big adjectives and  
23 adverbs or sell this to you as the crime of the century doesn't  
24 make them right. It doesn't mean they can't make a mistake by  
25 presenting a photo of the wrong restaurant to a cooperator and

1 watching him testify to the exact booth in the wrong photo  
2 where his welcome lunch took place.

3           You need to weigh the evidence as you would when  
4 making an important decision in your own life, a serious  
5 decision, a decision that affected someone you cared about  
6 deeply. That's the mindset you should bring to your  
7 deliberations. As Mr. Middendorf testified, his life is on the  
8 line

9           MS. KRAMER: Objection.

10          THE COURT: My instructions will be clear.

11          MR. BOXER: When you look at all of the evidence, all  
12 of the context, all of what does and does not get emailed and  
13 to whom, by whom, you should conclude that Mr. Middendorf is  
14 not guilty of the crimes with which he is charged.

15          Thank you.

16          THE COURT: Thank you.

17          We will now have the summation on behalf of defendant  
18 Wada. Mr. Cook.

19          MR. COOK: Your Honor, may we be heard briefly?

20          THE COURT: Yes. Why don't we take a 5-minute break.  
21 Leave your pads on your chairs, please.

22          (Jury not present)

23          THE COURT: Mr. Cook.

24          MR. COOK: Your Honor, I wanted to inquire briefly on  
25 scheduling for the remainder of the day. When we get back, it

1 will be close to 3 o'clock. I anticipate about two hours. But  
2 I don't want to be in a position where the jury is excused for  
3 the day and then hear the rebuttal on a different day. That  
4 would be prejudicial to our case. I would ask that we stay  
5 later to complete at least the summations or make some other  
6 arrangements.

7 THE COURT: I'm pretty sure the jury can't stay past  
8 5:00. There is at least one juror who can't stay past 5:00.

9 MR. COOK: In that case, I would request the  
10 opportunity to deliver my summation on the following court day,  
11 the same day as the rebuttal is delivered. Absent that, we are  
12 prejudiced by the government having an overnight opportunity to  
13 prepare rebuttal, something that we certainly didn't enjoy in  
14 response to the government's summation.

15 THE COURT: That is just a function of how long the  
16 closings are. Ms. Mermelstein?

17 MS. MERMELSTEIN: I'm not going to add anything to  
18 what your Honor just said. If the jury is able to stay, I'm  
19 very happy to have rebuttal over today. But I think the notion  
20 that there is some unfairness in the schedule -- this always  
21 happens in long trials with long summations. I don't think  
22 that we should waste two hours today and delay starting the  
23 next summation until tomorrow. We are happy to go late if the  
24 jury is available; otherwise, we should keep moving.

25 MR. BOXER: My only two cents, your Honor, is do we

1 know if the jury can sit tomorrow?

2 THE COURT: We haven't pressed the issue with the one  
3 juror.

4 MR. BOXER: That would heighten the prejudice, if we  
5 went from Thursday to Monday.

6 MR. COOK: I would ask that the Court inquire of the  
7 jury if they could stay to complete at least summations. It  
8 may be that they can't, but if you could inquire.

9 THE COURT: If I ask that they stay late, what would  
10 be your estimate? 6:00, 6:30?

11 MS. MERMELSTEIN: It is so hard for me to know because  
12 it is not written already and I don't know what Mr. Cook is  
13 going to say. I think that's right. I don't want to promise  
14 that and then be cut off. But I don't expect to go the length  
15 of a regular summation. I'm happy to do it tonight if the jury  
16 is available. Otherwise, I think we should keep moving.

17 The government agrees that we should sit tomorrow, to  
18 be clear. We don't want to rebut on Monday morning. We can  
19 take that up at the end of the day. I think we should keep  
20 moving today.

21 THE COURT: They might all be related. I might need  
22 to determine what to do about the juror who says she cannot  
23 come tomorrow. If we determine she cannot come tomorrow, I  
24 think I need to hear the parties' positions on where we go from  
25 there.

1 MR. COOK: In that circumstance, at least with regard  
2 to summations, I feel even more strongly that we make every  
3 effort to conclude them all tonight.

4 THE COURT: Would we come in and then sit tomorrow?

5 MR. COOK: If the jury is available to sit tomorrow,  
6 yes.

7 THE COURT: What if the one, Juror No. 7, is not?

8 MR. COOK: Our preference, assuming we don't complete  
9 summations, is that we resume on Monday.

10 MR. BOXER: Agreed, your Honor.

11 MS. MERMELSTEIN: Your Honor, we certainly want to  
12 give the jury who sat through the trial the opportunity to  
13 deliberate. If she is available or she learns more about her  
14 family situation and she can sit tomorrow, that would be great.  
15 I think we should sit tomorrow whatever that requires of the  
16 composition of the jury though.

17 We have three alternates. We are very close to the  
18 finish line at this point. It does not make sense to delay and  
19 push the whole trial -- they are not even deliberating in week  
20 four, which is what we told them it would be -- over the  
21 availability of one juror when there are three alternates.

22 Given Juror No. 7's family situation, it is  
23 unfortunately the case, of course, that something terrible may  
24 happen next week also. She wants to spend time with them. If  
25 something takes a bad turn, we can't know that she won't also



1 be available on Monday. I think we should sit tomorrow. The  
2 rest of the jury is available, as they said. I'm happy for  
3 your Honor to ask if they can sit tonight. Then we can plow  
4 forward. If they can't, Mr. Cook should sum up. I can start  
5 if there is time; if not, we will sum up tomorrow morning.

6 THE COURT: Is there any problem with my going back  
7 and asking them if they can sit on Friday and then if necessary  
8 follow up with Juror No. 7?

9 MS. MERMELSTEIN: I thought they had indicated that  
10 they could sit on Friday. We are happy for your Honor to  
11 follow up in any event.

12 MR. BOXER: No objection.

13 MR. COOK: No objection.

14 THE COURT: If I speak separately to Juror No. 7,  
15 would you like that on the record? Should I bring the court  
16 reporter back with me?

17 MS. KRAMER: Yes, your Honor.

18 MR. BOXER: I think it is a good idea, your Honor.

19 THE COURT: All right. We'll be in recess for five  
20 minutes.

21 (Recess).

22 (In the robing room, Juror No. 7 present).

23 THE COURT: You are Juror No. 7, Ms. Lewis, right?

24 JUROR: Yes.

25 THE COURT: I'm very sorry to hear about an accident

1 with someone in your family. I want to follow up on that. I  
2 was thinking about having the jury come back tomorrow and, if  
3 necessary, next week to finish the trial and deliberate. I  
4 wanted to ask what your situation is and if it is a hardship  
5 for you to sit tomorrow.

6 JUROR: They told me he only had a few days to live.  
7 That's only determined by God. He is out in Virginia. I  
8 wanted to drive down there with my family to go see him because  
9 this will be the last time I'm seeing him. It is my family  
10 member in the hospital.

11 THE COURT: Is it a close family member?

12 JUROR: Yes.

13 THE COURT: You wanted to go down tomorrow?

14 JUROR: Yes. I wanted to leave tomorrow. If you guys  
15 can excuse me, I can leave early in the afternoon, if I can  
16 leave a little early, only because we have to drive down there.  
17 My daughter is taking the day off for work so we all can go  
18 down there tomorrow.

19 THE COURT: Would you be able to sit for part of the  
20 day tomorrow?

21 JUROR: Yes.

22 THE COURT: How much? When would you have to leave?

23 JUROR: About 2 o'clock.

24 THE COURT: You could sit till 2:00?

25 JUROR: Yes.

1 THE COURT: Would you be able to come back in Monday  
2 if necessary?

3 JUROR: Yes, because I'm coming back on Sunday.

4 THE COURT: In terms of today, when do you have to  
5 leave?

6 JUROR: I'm not leaving today. I'm leaving tomorrow.

7 THE COURT: In terms of how late you can sit, could  
8 you sit past 5 o'clock today?

9 JUROR: Yes.

10 THE COURT: Go till 2:00 tomorrow without a problem?

11 JUROR: How will I let my job know if you guys are  
12 still on Monday?

13 THE COURT: We will tell them the trial is continuing.  
14 If there is any question, we can clarify that with them.

15 JUROR: No problem.

16 THE COURT: But you really want to be out by 2:00  
17 tomorrow?

18 JUROR: Yes, if I can.

19 THE COURT: This is a trip you really want to take?

20 JUROR: Yes.

21 THE COURT: Can you tell me any more about the family  
22 member?

23 JUROR: He has a weak heart.

24 THE COURT: Is it someone like a grandfather or  
25 something?

1 JUROR: No, it's not a grandfather. It's more like an  
2 uncle to me.

3 THE COURT: You are going to go down with your family  
4 members?

5 JUROR: Yes, my husband and one of my kids.

6 THE COURT: Thank you.

7 (In open court)

8 THE COURT: I first spoke with Juror No. 7, Ms. Lewis.  
9 Did you see the live feed?

10 MS. MERMELSTEIN: We didn't realize it was on. We  
11 weren't watching, your Honor.

12 THE COURT: Basically, I confirmed that she had a  
13 situation in her family involving an accident. It's an uncle  
14 or an uncle figure, not clear what, but someone she and her  
15 family are very close to, in Virginia. She wanted to drive  
16 down with her family to Virginia tomorrow, she said at the end  
17 of the day. She could leave around 2:00. She could sit  
18 tomorrow until 2:00 without having a problem.

19 I also spoke to the other jurors and first confirmed  
20 that they could not stay much past 5:00 today. There is a  
21 juror who works at 5:30 and another juror who had another issue  
22 with going much past 5:00. So we could go to 5:05 or 5:10  
23 today, that's it.

24 I confirmed also with all the jurors that they could  
25 sit tomorrow until 2:00. So we can sit tomorrow until 2:00.

1 I also mentioned to them, by the way, I don't know  
2 when it will go to the jury and how long deliberations will  
3 take, you could very well be coming back on Monday at 9:30, I  
4 want to confirm you are all okay with that, and they said yes.  
5 So they understand that.

6 MS. KRAMER: May we proceed, your Honor, for the rest  
7 of the afternoon?

8 THE COURT: I think we should. Do you think you have  
9 about two hours?

10 MR. COOK: I haven't timed it. That is my best  
11 estimate.

12 THE COURT: Why don't we go ahead with that. If we  
13 have to stop at 5:00 and you have to finish tomorrow, you will  
14 have to do that. Can we do that?

15 MR. COOK: Yes.

16 (Jury present)

17 THE COURT: Good afternoon. We will now have the  
18 summation on behalf of defendant Wada. Mr. Cook.

19 MR. COOK: The prosecutor was very direct with her  
20 views about why Mr. Wada is sitting in the courtroom today and  
21 what she thinks is his defense. That's fair enough. Let me be  
22 equally direct, without hyperbole or exaggeration, just what  
23 the evidence shows.

24 What the evidence shows is the government got suckered  
25 by Brian Sweet -- and my words are not evidence -- the

1 documents and the testimony that have been admitted during the  
2 trial. That is the evidence, and we are going to look at it  
3 together. After you look at it, not carefully selected  
4 excerpts of text messages and not voicemail messages played  
5 without any context or any background, but the evidence in  
6 context, no shortcuts and no blinders, you will see that the  
7 government got played by Brian Sweet and it's still happening.

8         The prosecutor just said a few minutes ago that Brian  
9 Sweet admitted all of his crimes. I don't know which Brian  
10 Sweet we are talking about, but it can't be the person who  
11 testified in this courtroom because that Brian Sweet was still  
12 admitting his crimes in December two months before this trial  
13 started; he was admitting to crimes a month later, right before  
14 the trial started; he was admitting to crimes on February 17th,  
15 during trial, two days before he would take the stand and  
16 testify; and he was still admitting to crimes the evening after  
17 he started testifying to you. In fact, on my cross-examination  
18 he was still coming clean with more crimes.

19         You decide, ladies and gentlemen, whether it is  
20 reasonable or even rational to conclude that Brian Sweet has  
21 admitted all of his crimes.

22         How did the government get it wrong? Two words you  
23 just heard me say: shortcuts and blinders. Shortcuts can be a  
24 good thing if you know where you're going or your destination  
25 is fixed and you know that's where you want to be. They are

1 not good things in a criminal investigation.

2           Blinders, most of you probably know what blinders are.  
3 They go on a horse to make sure the horse can't see to the  
4 side, it can only see straight ahead, with no distractions.  
5 Whatever value they have in a criminal case, they have no value  
6 in a criminal investigation. And when you combine them with  
7 shortcuts, the results are disastrous.

8           Like I said, my words aren't evidence. Let's talk  
9 about what the evidence actually was in this case.

10           Brian Sweet's world started to fall apart in February  
11 of 2017. That's when it started to unravel. He's got the  
12 final 2017 inspection list. He can't help himself but to call  
13 people and tell them that he knows that their clients are going  
14 to be inspected by PCAOB.

15           Then he calls Diana Kunz. You heard her testimony.

16 "Q. Mr. Sweet, what did you tell Diana Kunz in sum and  
17 substance?

18 "A. I remember when I called Diana, she answered the phone and  
19 said like, oh, crap, it's never a good thing when you call me.  
20 And I said, yeah, Diana, we just got a heads-up, and it looks  
21 like Chemical is going to be inspected by the PCAOB this year."

22           Diana Kunz waits a few days, doesn't call anyone right  
23 away. Eventually this message gets passed along up the chain  
24 at KPMG and gets to Mark Rubino. Brian Sweet was interviewed  
25 by Mr. Rubino. You heard him testify.

1 "You were interviewed on February 14, 2017?

2 "Yes.

3 "Who conducted it?

4 "The call was with Mark Rubino from KPMG's internal  
5 counsel."

6 During that interview, Mr. Sweet does not identify  
7 Jeffrey Wada as the source of the PCAOB inspections. It's not  
8 until the following month, when he is interviewed by KPMG's  
9 outside counsel that he first points the finger at Jeff Wada.  
10 Here is his testimony.

11 "Q. Did there come a time when you were interviewed by a law  
12 firm in connection with KPMG's internal investigation?

13 "A. Yes.

14 "Q. Were you truthful in those interviews or did you tell lies?

15 "A. I told lies.

16 "Q. What kinds of lies did you tell in those interviews?

17 "A. I lied about not knowing, not knowing who the original  
18 source was, that Jeff Wada the person at PCAOB. Actually, I  
19 take that back. I think at that point I -- no, I'm sorry, at  
20 that point -- at that point I had told them that it was Jeff  
21 Wada. Excuse me."

22 So, during the interviews a month after he's caught,  
23 with outside counsel he acknowledges, he claims, for the first  
24 time that Jeff Wada was Cynthia Holder's source. Then, about  
25 five months after this whole scheme unraveled for Mr. Sweet, he



1 has his first interview with the government

2 pursuant to this proffer agreement you saw in  
3 evidence, he had four interviews with the government, the first  
4 one on July 25, 2017, and then three very lengthy interviews in  
5 August. You heard him testify that those interviews lasted  
6 about 30 hours total, and included in those interviews were  
7 specific questions about his background.

8 You heard him testify, and you saw in the proffer  
9 agreement, that the reason why they are going through this  
10 background is to evaluate whether he would be a viable  
11 candidate to be a cooperating witness in their case. So they  
12 listened to what he had to say. They asked him about his  
13 background generally, and then they asked him specifically,  
14 very specific questions: tell us about, and then there is a  
15 whole list of issues that we talked about, Brian Sweet and I,  
16 when he was on cross-examination.

17 He answered those questions. He lied over and over  
18 again. He sold himself like he does so well. He talked to the  
19 government. They listened. They believed him. They built  
20 their case around what he told them. He knew what they wanted  
21 to hear and he knew what he wanted to say, and he had five  
22 months to prepare for that.

23 So he pointed the finger at other people as he had  
24 done earlier. Remember what he had said before.

25 "Q. You lied about the things that could get you into trouble,

1 right?

2 "A. Yes. I generally tried to point blame at other people and  
3 underemphasize my role in this, yes.

4 "Q. Point blame at other people?

5 "A. Yes."

6 That's Brian Sweet. He is willing to lie and point  
7 the finger at other people in order to get out of trouble or  
8 avoid getting into trouble. What is he willing to do to get  
9 out of this trouble, 25 years in prison trouble? Knowing what  
10 you know about Brian Sweet, having heard all of his testimony,  
11 is there anything that that man would not say to keep the  
12 government happy, to ensure that that cooperation agreement  
13 stays intact, and that hopefully they are happy enough not to  
14 prosecute him for all of the crimes that he confessed to over  
15 the months?

16 Let's talk about Sweet's relationship with his former  
17 PCAOB colleagues. If you are willing to point at people in  
18 order to get out of trouble, who better to point the finger at  
19 if you are Brian Sweet than Jeffrey Wada.

20 What did Brian Sweet know about Jeff Wada? This is a  
21 guy that Brian Sweet knew had been passed over for promotion  
22 several times. He knew that he could be crude. He was not  
23 well liked at PCAOB. He knew, Sweet knew, he was never going  
24 to be hired at KPMG no matter what he said to Brian, to  
25 Cynthia, to Jeff. He was never going to pass his résumé along

1 and get him hired.

2 He knew that Jeff Wada close friends with Cynthia  
3 Holder. Now there was a plausible connection between Jeff and  
4 Cynthia so that he could point the finger at Jeff and have a  
5 plausible reason why there would be a transmittal of  
6 communication between Jeff and Brian.

7 Finally, Brian and Jeff were not friends. I asked him  
8 about that.

9 "Did you ever hang out together?

10 "We didn't.

11 "Did you ever talk on the phone?

12 "No.

13 "Text each other?

14 "No.

15 "Lunch or dinner?

16 "Not that I remember."

17 These were all questions based on activities that he  
18 engaged in, Brian did, with lots of other people at the PCAOB.  
19 What was clear was that he did not enjoy that kind of  
20 relationship with Jeffrey Wada at all.

21 However, contrast that with his relationship with some  
22 of his other colleagues. For example:

23 "Who do you remember maintaining contact with?" This  
24 is Mr. Sweet.

25 "There were quite a few people, but it certainly

1 included Bob Ross, Jung Lee, Grady Peeler, David Nitz, Steve  
2 Schindler, and others."

3 I asked him, "Did you ever try to get confidential  
4 information from your former colleagues at the PCAOB?

5 "Yes."

6 He didn't just try. He was successful

7 "Q. And Bob Ross was one of your sources of confidential  
8 information, confidential PCAOB information, correct?

9 "A. Bob Ross did provide me with confidential information."

10 Bob Ross was one of his prime targets. As early as  
11 May 2015, just a couple of weeks after he joined the PCAOB, he  
12 is telling Tom Whittle, "I'm meeting with Bob Ross the week of  
13 June 1, so hopefully we'll see some fruit from that.

14 Jung Lee. "Two months before he was inspecting KPMG,  
15 he was sending you his resume," Jung Lee was.

16 "Yes.

17 "He felt that Mr. Lee was not as objective as he  
18 normally would have been on that inspection, right?

19 "Yes."

20 Then Mr. Lee gave confidential information to Brian  
21 Sweet about a Spanish bank that the PCAOB was inspecting and  
22 that KPMG was pitching as a potential client.

23 "You knew that because when you were at the PCAOB you  
24 had access to that information, right?

25 "No. That was something that Yung Lee told me.

1 "So you learned it from a former colleague at the  
2 PCAOB?

3 "Yes.

4 "That was confidential information, right?

5 "Yes."

6 He manipulated his contacts, many of whom wanted jobs  
7 at KPMG, in order to recruit them to KPMG directly. All of the  
8 résumés that he received over the time he worked at KPMG, some  
9 he passed on to recruit, to become employees, others he just  
10 maintained contact with so that he could pump them for  
11 information. That is who Brian Sweet is. That is his nature.  
12 You saw that over and over again during his testimony, and you  
13 have seen that in the evidence.

14 What were the government's blinders that I talked  
15 about? Ask yourself, whose job is it to provide you with the  
16 information in a criminal case that would disprove reasonable  
17 alternatives to the explanation that Brian Sweet gave? The  
18 government has the burden here, not Mr. Wada. It's their job  
19 to prove Mr. Wada guilty beyond a reasonable doubt, not the  
20 other way around.

21 If the government hadn't take a shortcut with Mr.  
22 Sweet, if they hadn't just bought his story, what might you  
23 have seen during this trial? Did you hear from Bob Ross,  
24 Sweet's close friend and an acknowledged source of confidential  
25 information? You did not.

1 Did you see any of Bob Ross's text messages,  
2 phonecalls, phone records, emails, any of them, from a man that  
3 Brian Sweet acknowledged receiving confidential information  
4 from, a man that was a close friend of Brian Sweet? Did you  
5 hear from the postal inspectors who sat there for the entire  
6 trial? Did they tell you anything that they did to investigate  
7 anybody other than Jeffrey Wada? Did they do any interviews,  
8 collect any emails, read any text messages, anything? No.

9 The government can choose any way it wants to  
10 investigate a case. That's their prerogative. They are not on  
11 trial. But they do have the burden of proof. When reasonable  
12 alternatives to the theory that Brian Sweet was proposing  
13 present themselves, they have an obligation to disprove those  
14 beyond a reasonable doubt.

15 What about Yung Lee, another source of confidential  
16 information? Did we see any of his emails? Did we hear any of  
17 his voicemails? Did we learn of his relationship with Brian  
18 Sweet? Anything? What about Jeff Watkins? What about all the  
19 others? Did they even look?

20 Ladies and gentlemen, that is what reasonable doubt  
21 looks like, right there. As I said, they have no obligation to  
22 conduct their investigation in any particular way or to use any  
23 particular techniques. Every witness I just talked about is  
24 equally available or unavailable to the government and the  
25 defense. The fundamental difference is we do not have the

1 burden of proof.

2           They have advanced this case. They have charged the  
3 man with a crime. They have based their evidence on the  
4 testimony of a man who is known to receive information,  
5 confidential information, from multiple sources. And, as you  
6 will see in just a few minutes, there is substantial evidence  
7 to believe that one or more of these other individuals were the  
8 sources of the information for which my client has been  
9 charged.

10           You are going to hear an instruction tomorrow from the  
11 Court. It is going to be an instruction that explains what  
12 circumstantial evidence means. Much of what you have heard in  
13 this case is circumstantial evidence.

14           The definition or the example that the Court is going  
15 to use is going to be something like you're in a room, and in  
16 walk two people. There are no windows so you can't see  
17 outside. The first one walks in holding an umbrella and it's  
18 wet. The next person comes in and is wearing a raincoat and  
19 it's wet. You conclude from that circumstantial evidence that  
20 it is raining outside.

21           That might be a reasonable conclusion you could reach,  
22 not being able to see outside yourself, based on what is in  
23 front of you. That's circumstantial evidence. That's the  
24 difference between direct evidence, it's not something you  
25 actually saw.

1           However, when those two people are followed by more  
2 people who are wearing shorts and a T-shirt, sunglasses, and a  
3 baseball cap and are perfectly dry, all of a sudden that first  
4 conclusion that seemed reasonable is no longer reasonable. Now  
5 you've got to ask more questions, you've got to do more  
6 investigating. That's the nature of circumstantial evidence.  
7 That's what the government didn't do, in a nutshell.

8           Let's talk about what they actually did, what the  
9 actual evidence is, not excerpts, not in isolation, but in  
10 context. Let's start with the 2016 inspection list. I do  
11 agree with what the prosecutors said regarding the nature of  
12 the case as to Mr. Wada. At its core it is was Jeffrey Wada  
13 the source of the 2016 inspection list, the 2017 preliminary  
14 list, and the 2017 final list. That is the heart of the case.  
15 It is not the only issue, but it is the heart of it. So let's  
16 start with 2016.

17           Here are the core allegations I just described.

18           First of all, let's step back and think about what  
19 Brian Sweet actually told you. He was not a participant in any  
20 of the conversations that Cindy Holder had with Jeff Wada.  
21 Everything he knows or thinks he knows about Jeff Wada goes  
22 like this.

23           Brian Sweet testified to what Cynthia Holder told him  
24 as to what Jeff Wada told her were the names on the inspection  
25 list. He is at least two steps removed down the chain. So, if



1 you accept Brian Sweet's testimony, even if you believe he is  
2 telling the truth, you must also believe that Cynthia Holder is  
3 telling the truth. Do you have any way at all to evaluate her  
4 credibility, her motivations, and whether or not she might have  
5 lied to him? That's assuming you get past all the problems  
6 with Brian Sweet.

7 Much of the evidence you have seen relates to text  
8 messages. We are going to dive into those in just a second. I  
9 just want to pause here and talk about that particular type of  
10 evidence.

11 Many of you, maybe most of you, use text communication  
12 all the time from family, friends, maybe even with work. For  
13 some people, maybe some of you, it is a primary means of  
14 communication. In some cases it becomes even more common than  
15 face-to-face communication. It is now part of our everyday  
16 lives. So you know what that's like.

17 If you are familiar with it, it is very fast, it is  
18 rapid back-and-forths. It is abbreviated. There are  
19 shortcuts, there is jargon, there is slang, there are inside  
20 jokes. There is a natural familiarity that people have with  
21 each other, so they use shortcuts in their speaking manner.  
22 Sometimes it barely even resembles English.

23 The people texting typically know exactly what is  
24 being communicated back and forth. But if you are standing on  
25 the outside, you may think you know, but you don't always get

1 it right because you don't have that relationship with the  
2 other party.

3 For a complete stranger to try and decode the meaning  
4 of a text message standing on the outside without knowing the  
5 two participants, knowing their relationship to each other,  
6 their history with each other, how they talk to each other,  
7 their families, the whole gamut of their relationship, is  
8 fraught with danger. It is particularly dangerous in a federal  
9 criminal trial where you have to draw conclusions beyond a  
10 reasonable doubt.

11 Imagine for a moment, whether it is a text message  
12 with a friend or it's a face-to-face conversation, imagine  
13 someone is eavesdropping on your conversation. They don't know  
14 you. They don't know how you speak. They don't know the  
15 nature of your relationship. They don't know your background,  
16 the slang, the jargon, the inside jokes. They don't know when  
17 you are kidding, they don't know when you are serious. They  
18 don't know anything about you and they don't know anything  
19 about the relationship you have with the other party. Somebody  
20 completely foreign to your relationship.

21 Could you be confident that that eavesdropper would  
22 understand what you are talking about? Would you feel  
23 confident that your meaning will be properly understood by the  
24 stranger? And, to really cut to the heart of it, would you be  
25 willing to trust that person without hesitation to make an

1 important decision in your life, in your personal affairs,  
2 based on what they understood you to be talking about?

3 I used those words specifically because you are going  
4 to hear that to prove a fact beyond a reasonable doubt is to  
5 have, as the judge will instruct you, an abiding belief in the  
6 truth of that fact, a belief that you would be willing to act  
7 upon without hesitation in an important matter in the personal  
8 affairs of your own life. Could you rely on an outside  
9 observer to interpret your conversation with that level of  
10 accuracy?

11 The government is asking you to be that eavesdropper,  
12 not in an improper way, but to read the private conversations  
13 between two long-time friends, make assumptions about what is  
14 being discussed without talking to either party about what is  
15 meant in seriousness, what is meant in jest. They are also  
16 asking you to make assumptions about the meaning of those  
17 communications in a way that falls into line with the narrative  
18 that Brian Sweet gave them

19 Remember, it is up to you to determine what weight to  
20 give these conversations and the interpretations that the  
21 government is urging you to make.

22 With that aside with regard to text messages, let's  
23 dive into the evidence. March 28, 2016, is the day the  
24 government claims Mr. Wada gave Cindy Holder the 2016 PCAOB  
25 inspection list. What is their evidence? Let's take a look at

1 Government Exhibit 1362. You saw this document towards the end  
2 of the trial.

3 It's a summary chart that the government created based  
4 on other documents that are in evidence. This is their time  
5 line of what they contend are the key events surrounding the  
6 2016 inspection list as well as what Brian Sweet did with it  
7 afterwards. The excerpts are carefully chosen. They are  
8 assembled to help guide you to the inescapable conclusion that  
9 it must be Jeff Wada, and what he must be talking about here  
10 and what he must be doing is giving Cindy Holder the inspection  
11 list.

12 What does he say? "Cynthia, happy Easter."

13 She tells Mr. Wada she's going to New York, to let him  
14 know when he has time to chat tomorrow, three exclamation  
15 marks. You heard repeatedly about the exclamation marks and  
16 some suggestion that we can divine some meaning about Cindy  
17 Holder's emotion from her exclamation marks. I spent a lot of  
18 time looking at those and I took the time to count, which you  
19 can too because all these will be in evidence, if you want to,  
20 the number of times she uses exclamation marks in her text  
21 messages. It's about one in four.

22 (Continued on next page)

23  
24  
25

1 MR. COOK: Of the five exclamation marks, and if it is  
2 any gauge at all, getting a vanilla, non-fat latte merits four  
3 exclamation marks.

4 So, what's the point of that? You can't draw any  
5 meaning at all from her use of punctuation, just like it is  
6 really hard to draw any conclusions at all about the slang and  
7 the jargon that people you don't know are using when they are  
8 talking with friends. That is the point of this. That's what  
9 makes this so difficult.

10 Why is Cindy Holder anxious to talk to Jeff? We have  
11 no idea. Did she get a new car? Is she going on vacation?  
12 Maybe she just likes to use exclamation marks. We know that.  
13 The first vague clue as to what's being discussed in here is  
14 "Kristie Zhang is still interested." Interested in what?

15 The problem here is that the government chose not to  
16 include some text messages that give you the context to  
17 understand what these people are talking about. We know from  
18 the roster of PCAOB inspectors who went to inspector training  
19 that Kristie Zhang was, and may still be, a PCAOB inspector.  
20 So now we know that she's someone who works at the PCAOB and  
21 she is an inspector. And if we look at the source documents  
22 for these text messages, which the government introduced as  
23 part of a separate exhibit, Government Exhibit 1443, we see  
24 that the government omitted from this summary timeline these  
25 text messages:

1 "Kristie Zhang is still interested."

2 That was there.

3 "OK, call me. Call me first thing if you can.

4 "OK. Scott H has halted hiring at the moment. I'll  
5 explain tomorrow.

6 "Really? Sounds like there is a story behind it."

7 Now, with that context that wasn't there before, now  
8 we have a little, as best we can tell from text messages from  
9 strangers, what it is that they are going to talk about.

10 And what really this is -- this is really a recruiting  
11 discussion.

12 "Scott H has halted hiring at the moment. I'll  
13 explain tomorrow."

14 Kristie Zhang being interested.

15 Can we draw a conclusion that what is being discussed  
16 here is a recruiting opportunity?

17 And then Mr. Wada says: "Sounds like there is a story  
18 behind it."

19 It is also clear that those extra facts, when they are  
20 added into this exhibit, they don't help prove Mr. Sweet's  
21 allegation. It makes it messy. It creates doubt about what is  
22 being discussed. Without the context with the blinders on.

23 You might assume that this text message is about an  
24 inspection list. You would be reading it all wrong, or at  
25 minimum you would be overlooking other reasonable

1 interpretations. That is reasonable doubt.

2 That's not all. It's clear that this conversation was  
3 about recruiting because it had been a topic of conversation  
4 between Ms. Holder and Mr. Wada for several weeks.

5 You saw this exhibit, the government summary chart of  
6 the iMessages from February 5, 2016, the previous month. The  
7 context that is needed to even try and understand what "just  
8 talked to Wada about many things" has been omitted from the  
9 summary slide, the implication being that something improper or  
10 nefarious is going on. You'd have to piece it together with  
11 another defense exhibit that we introduced in order to see what  
12 actually they're talking about. But if you consider this text  
13 exchange together with the simultaneous conversation Ms. Holder  
14 was having with Mr. Wada, you realize that the government left  
15 part of the conversation out.

16 Now, read chronologically and in context: "Hey, how  
17 are you? You never called me last weekend about your  
18 accounting question. By the way, I had someone in mind for  
19 that spot you brought to me, but she was already contacted by  
20 one of your colleagues."

21 And then Ms. Holder texts Brian Sweet: "Call when you  
22 can. I just talked to Wada about many things."

23 Now the suggestion, or the insinuation that "I just  
24 talked to Wada about many things" means an inspection list is  
25 far less clear because Mr. Wada and Ms. Holder were just

1     texting within 40 minutes of her conversation with Mr. Sweet  
2     about an accounting question that she had -- whatever that  
3     might be, we have no idea -- and about another recruiting  
4     option.

5             This is why it's so important to have the context of  
6     the conversation. But if you put blinders on, and you adopt  
7     one person's version of events, like Mr. Sweet's, and you are  
8     blind to other possibilities, it can lead you down the wrong  
9     path.

10            Now, they go on to try and coordinate a call,  
11     presumably to discuss this accounting question, discuss what  
12     Mr. Wada had in find for a spot. "Sounds like somebody already  
13     snagged this person at KPMG." Then they talk on the phone.  
14     And Cindy calls Brian Sweet and she says she talked to Wada  
15     about many things. Again, we have absolutely no idea what they  
16     talked about. We can only guess and speculate. But the  
17     context helps -- at least provides some insight into what that  
18     conversation was about.

19            What is there not even a hint of in any of this? That  
20     they were talking about confidential inspection lists. Not  
21     even a hint, and in fact the actual evidence suggests something  
22     completely different.

23            Remember Brian Sweet's testimony on cross-examination:

24            "Once you started working at KPMG in May 2015, you  
25     immediately focused on helping KPMG find additional people to



1 recruit, right?

2 "A I was asked, even before joining, to identify who else  
3 might be good candidates for KPMG to hire.

4 "Q This was a significant concerted effort by KPMG to bring  
5 over PCAOB inspectors, right?

6 "A Yes."

7 So not only do we have this conversation between Cindy  
8 and Jeff about what appears to be recruiting, we learn, with  
9 this additional context, that Brian Sweet was actively engaged  
10 in recruiting efforts at KPMG in order to bring PCAOB people  
11 over, which just lends further support to a different  
12 interpretation of that text message, that it had nothing to do  
13 with inspection lists.

14 And Mr. Sweet and Mr. Lynch started making lists.  
15 They made lists of PCAOB recruiting targets. You may recall we  
16 talked about this quite a bit with Brian Sweet. He explained  
17 that he and Joe Lynch -- Joe being a former PCAOB employee --  
18 also got together and they created these three lists. People  
19 who were interested but not that good or good but not that  
20 interested. I don't remember all the details, but there are  
21 three categories of people. And everybody on this list are  
22 former -- are PCAOB potential targets for recruitment. And  
23 this was a living document.

24 Cindy Holder, once she joined KPMG enthusiastically  
25 participated and she did it with a huge financial incentive.

1 Recall what Mr. Whittle said:

2 "Q How did that work?

3 "A It was called a referral bonus."

4 And he goes on: "I don't recall exactly, but if you  
5 referred a friend and they came to join the firm, you got a  
6 bonus for doing it.

7 "Q And it could be thousands of dollars, right?

8 "A Yes."

9 Now, it didn't apply to partners but Cindy Holder was  
10 not a partner. She was eligible to make thousands of dollars  
11 for every recruit.

12 Again, Mr. Whittle: "Do you remember what Cindy  
13 Holder's title was when she came to KPMG?

14 "She was an executive director.

15 "She would have been eligible for a referral bonus if  
16 she recruited people, right?

17 "She was not a partner or a managing director so,  
18 presumably, yes."

19 Again, with this additional context, it becomes even  
20 more not only likely but understandable why Cindy Holder will  
21 be talking to Jeff Wada, who was working at the PCAOB, about  
22 recruitment targets. They were friends.

23 And it also has the added bit of emphasis that that  
24 interpretation is consistent with the actual words of the text  
25 message itself.

1           This was a focused continuing effort to bring over as  
2 many people as possible.

3           So what are the lists? These are them? You just saw  
4 them. They start putting them together right away. They  
5 understood it was part of Brian Sweet's job to do it, and it  
6 was something that Cindy Holder could make money doing.

7           So now let's go back to be January 28, 2016. This is  
8 the day in which the inspection list is supposedly given by  
9 Jeff Wada to Cindy Holder, at least according to Brian Sweet --  
10 a list that is never mentioned or talked about in any of Cindy  
11 or Jeff's text messages.

12           Here's the summary chart again plus the omitted  
13 messages so we have some context.

14           And you see the last text message. It says: "Sounds  
15 like there is a story behind it."

16           So, now I will go to the next page of the government's  
17 summary chart, and you see that there is a phone call -- this  
18 51-minute phone call that you heard about during the  
19 government's closing argument.

20           Now, the government claims that Jeff Wada gave Cindy  
21 Holder the 2016 inspection list. Do we have a recording of  
22 that call? We don't. Did Cindy Holder tell you that Jeff Wada  
23 gave him the list? No. How do we know that that actually  
24 happened? Only the testimony of Brian Sweet. That's it.  
25 There is nothing else. And with the context provided to the

1 text messages, there is not even an insinuation that they were  
2 talking about an inspection list.

3           Jeff Wada spoke to Cindy Holder all the time. It is  
4 not unusual that they would talk. The only indication from the  
5 evidence is that they're talking about recruiting. But the  
6 government built its entire case around Brian Sweet's  
7 statements to them that Cindy Holder told him that Jeff Wada  
8 told her that he had the inspection list.

9           Go back to the summary chart.

10           Mr. Sweet testified that Cindy Holder was anxious to  
11 get ahold of him after she spoke Mr. Wada. Nearly a 24-minute  
12 phone call at 1:56 p.m. that afternoon, what did Mr. Sweet say  
13 about that call?

14 "Q What did Cindy Holder tell you during that phone call?

15 "A That she had received a call from Jeff Wada and that Jeff  
16 had provided her with the names of who the PCAOB was going to  
17 be inspecting for the banks in 2016."

18           That's it. That's the government's case against  
19 Mr. Wada for the 2016 inspection list. Out of context,  
20 inferences from text messages, and the testimony of Brian  
21 Sweet.

22           Now, following this there was a bunch of -- a flurry  
23 of activity between Mr. Sweet, Mr. Whittle and Mr. Britt, all  
24 of it silent as to Mr. Wada and the inspection list. The whole  
25 weight of the government's case in 2016 -- and we'll get to

1 2017 in a minute, rests on Mr. Sweet's narration of these  
2 records. All of it.

3 I'm going to show you right now with certainty that  
4 Mr. Sweet was lying about this. In order to do that, you need  
5 to have some more context.

6 Remember the 2016 inspection list that Mr. Wada is  
7 accused of giving to Cindy Holder? That wasn't the entire  
8 inspection list, it was just the banking targets.

9 Here's what Mr. Whittle said about that:

10 "In general, what types of engagements were on the  
11 list that Mr. Sweet shared?

12 "A The majority were banks, smaller banks, and then there were  
13 a handful that were non-banking clients."

14 Ladies and gentlemen, regarding the source of the  
15 list, here's what Mr. Whittle testified Brian Sweet told him:

16 "Q Do you have, leaving aside the exact words, a general  
17 recollection of what was explained about the nature of the list  
18 having mostly banks but not totally banks during that phone  
19 call?

20 "A Generally, that it was someone who had worked in the  
21 banking group at the PCAOB."

22 It is undisputed in this case that Mr. Wada never  
23 worked in the banking group of the PCAOB. Mr. Whittle is the  
24 government's cooperating witness. He testified that Brian  
25 Sweet said it was someone in the banking group that was the

1 source. That could not have been Jeff Wada because he was  
2 never in the banking group.

3 Stephanie Rodriguez in her testimony confirmed this:

4 "Between 2015 and 2017, was Jeffrey Wada on the KPMG  
5 U.S. inspection team at any point in time?

6 "A Not to my knowledge.

7 "Q What, if any, connection did he have to the KPMG team?

8 "A My understanding, he worked on the inspections of the Japan  
9 affiliate so he would have been on the international side."

10 Mr. Whittle has no reason to lie in a way that tends  
11 to support Mr. Wada's innocence, but his testimony does exactly  
12 that. And it also establishes that Brian Sweet is lying.

13 That's not all.

14 Remember Mr. Sweet was willing to lie about other  
15 people's involvement and point the finger elsewhere. He had  
16 more of a motive to do so here than ever before. In addition  
17 to giving the government what he wanted, he could point the  
18 finger to someone like Jeff Wada, who was nothing to Brian  
19 Sweet. That would be easy for him. He could point the finger  
20 away from his friends.

21 So if not Mr. Wada, who was the source? I don't know  
22 that. We don't know that. But there is evidence in the record  
23 that suggests that it's someone other than Mr. Wada.

24 Two names are at the top of the list -- Bob Ross and  
25 Jeff Watkins. I'm not just pulling those names out of thin

1 air. There is a reason. Bob Ross was a PCAOB associate  
2 directors. That is a level above Mr. Wada.

3 What do we know about Bob Ross' relationship with  
4 Brian Sweet? First, Brian Sweet, Cindy Holder and Bob Ross all  
5 worked together in London. They were friends.

6 How did Brian Sweet think of Bob Ross? They were  
7 close friends, as he testified.

8 Did Brian Sweet extract confidential information from  
9 his close friend Bob Ross?

10 "Bob Ross did provide me with confidential  
11 information," he said.

12 Mr. Whittle testified that Sweet told him that the  
13 source was someone in the banking group. Where was Bob Ross  
14 assigned in 2015, in 2016? Stephanie Rodriguez answered that  
15 question:

16 "What, if any, role did Bob Ross have?  
17 "A At that time, Bob sat over most of our banking inspections,  
18 and he was our banking ATL, or associate team leader."

19 And what about contact between Bob Ross and Brian  
20 Sweet leading up to the day that the government contends that  
21 inspection list came into Brian Sweet's hands? Take a look at  
22 Bob Ross' -- sorry, Brian Sweet's calendar entries.

23 He was meeting with Bob, who he testified was Bob  
24 Ross, on January 6th. He had lunch with Bob at Bills again in  
25 February 2016. At a minimum, we know that this was a live

1 relationship. It wasn't an old friend; they had continuing  
2 ongoing contact.

3 Bob Ross was working at the PCAOB, and he was working  
4 in the Banking Inspection Group. They were friends, and he had  
5 given him confidential information before.

6 Ladies and gentlemen, that is reasonable doubt.

7 Why, knowing all this -- this is all in evidence --  
8 knowing all this, did we not see any evidence of any  
9 investigation into Bob Ross? There was a great effort to  
10 collect, collate and arrange all of Jeff Wada's text messages  
11 in a way that fit the story that Brian Sweet was selling. Why  
12 not look at Bob Ross? All of this information points to him.  
13 They were friends. He was a source. And he worked in the  
14 group that Whittle said Sweet got the information from.

15 That is what reasonable doubt looks like.

16 Now, what about Jeffrey Watkins? Where does he fit  
17 into this? Let's look at an email from Brian Sweet to Tom  
18 Whittle, May 21, 2015:

19 "Also, FYI, I had dinner with Jeff Watkins and several  
20 of the PCAOB inspectors from the BONY" -- that's Bank of New  
21 York -- "team last night and it sounds like things are going  
22 well."

23 So we know that, first of all, what does Brian Sweet  
24 say about Mr. Watkins? The fact he was very motivated to find  
25 a job at KPMG, having been let go. What does that mean? This



1 was in February 2016. Do you remember the government claimed  
2 that Sweet obtained the list in March 2016? And we know from  
3 Sweet's text messages with Cindy Holder that Mr. Sweet's  
4 understanding of Jeff Watkins' situation is that he had been  
5 fired from the PCAOB the previous month. But he wasn't let go  
6 immediately. According to Mr. Sweet, his understanding was  
7 that he was able to finish out the month. So that brings Jeff  
8 Watkins to the end of February as a PCAOB employee, Banking  
9 Group employee, getting ready to get fired, and a close friend  
10 of Brian Sweet.

11           Actually fired immediately prior to the information  
12 disclosure. He needed a job and was actually asking Brian  
13 Sweet for help in getting him a job -- five days before Brian  
14 Sweet claims he received the inspection list, from somebody in  
15 the Banking Group.

16           Did Mr. Sweet urge Jeff Watkins to steal information  
17 the same way he did, in the same way Brian Sweet urged Cynthia  
18 Holder to do? We don't know. Have no idea. Who has the  
19 greater incentive to steel confidential information from the  
20 PCAOB at this point in time? Jeff Watkins, who was about to be  
21 fired, who was friends with Brian Sweet and is asking Brian  
22 Sweet for help getting a job?

23           Knowing that the circumstantial evidence of Jeff  
24 Wada's implication in this list is outweighed by the  
25 circumstantial evidence that Bob Ross was the source or Jeff

1 Watkins was the source, has the government met its burden of  
2 proving Jeff Wada guilty beyond a reasonable doubt of being the  
3 source of the 2016 inspection list, knowing what we know about  
4 these other potential sources for that list? Do we have any  
5 information at all from those other two sources that would  
6 prove or disprove their involvement in this scheme?

7 No, the government is not on trial, but they do have  
8 the burden of proof. Then choose what investigative techniques  
9 they want, and any party could have called the postal  
10 inspectors to ask them what they did, if anything. But it is  
11 not Jeff Wada's burden to prove himself innocent.

12 And when presented with this evidence, this additional  
13 context, particularly strong evidence pointing in two different  
14 directions, they have an obligation to prove these reasonable  
15 options, these reasonable alternatives, or disprove them,  
16 beyond a reasonable doubt. They did not do that. This is what  
17 I meant when I said shortcuts and blinders. This is what I was  
18 talking about.

19 They took Brian Sweet's story as gospel. They didn't  
20 challenge it. They found ways to make the evidence fit,  
21 carefully selecting what they showed you. Even during  
22 summation, the text messages that they claim support their  
23 conclusion that Jeff Wada was the source were flashed up in  
24 front of you for a few seconds for you to look at without any  
25 context, without the background documents to really evaluate.

1 This is tedious stuff. This is -- it takes tough to unpack  
2 Brian Sweet's lies, it takes effort.

3 But given what's at stake, isn't that what's owed to  
4 somebody charged with a criminal offense?

5 That didn't happen here.

6 And because the government has failed to meet its  
7 burden of proof, because it's failed to disprove these other  
8 potential sources of that 2016 list, you must find Mr. Wada not  
9 guilty on Count Four, which is the charge focused specifically  
10 on the 2016 list.

11 Let's talk about the 2017 preliminary list, and I'll  
12 just say at the outset, it suffers from the same defects.

13 In fact, it fails even more spectacularly than the  
14 2016 list.

15 As with the 2016 case, it is constructed around Brian  
16 Sweet's testimony. All of which on its face -- well, his  
17 testimony about what the text messages and phone records mean,  
18 but those records on their face are silent. They make no  
19 mention of an inspection list.

20 Brian Sweet again, as he did in 2016 and he will,  
21 you'll see later in the 2017 list, he gets tripped up on his  
22 own lies. Let me be direct about it. Brian Sweet lied to you  
23 on the witness stand about Jeff Wada's involvement in the 2017  
24 preliminary list. That's not speculation or exaggeration.  
25 It's a fact. And I can show you why that's the case. I'll

1 show you how he did it. You'll see for yourself how the  
2 government tried to blind you from that fact.

3 But like everything else, you have to have the right  
4 context to see what's going on.

5 So let's start with the date the government claims  
6 Mr. Wada gave Cindy Holder that list, January 9, 2017.

7 Take a look at the summary chart that the government  
8 used to support its claim.

9 The government begins its timeline at 2:24 p.m., and  
10 that's important. It's also odd.

11 Their star cooperator, Brian Sweet, testified that the  
12 most important event on that day, Mr. Wada's call with  
13 Ms. Holder in which he gave her the list, he testified it took  
14 place in the morning, not at 2:24 in the afternoon.

15 Let's continue with the government's timeline.

16 The government begins with that 2:24 text message from  
17 Cindy Holder to Jeff Wada asking: Any idea who the ADs will be  
18 in the Banking Group yet, or for that matter -- for anyone, for  
19 that matter? LOL.

20 Ms. Holder is referring to the Banking Inspection  
21 Group that the PCAOB has not yet announced officially but that  
22 you saw during Mr. Whittle's testimony everybody knew about and  
23 that multiple people have been talking about it throughout  
24 KPMG. Why did everyone care so much about this group? Because  
25 it meant that the Bob Ross, who had been rotated off of

1 inspecting KPMG, he was assigned to the Banking Inspection  
2 Group. That meant that he could come back and begin inspecting  
3 KPMG again. And that meant that Brian Sweet would have a  
4 better source of information from his friend because now he  
5 would have had access to KPMG information.

6 About an hour after this time, 3:23 p.m., Jeff Wada  
7 leaves a voicemail message in which he tells Cynthia Holder  
8 that he has the list, the grocery list, and tells her to give  
9 him a call.

10 You've heard the phrase "grocery list" over and over  
11 again. It is a secret code. You've heard that since the  
12 government's opening statement. You heard it in their  
13 summation. They've been telling you that repeatedly. It's all  
14 based on Brian Sweet. Brian Sweet is the only person who  
15 testified that Cindy Holder told him that "grocery list" really  
16 means inspection list.

17 Now, there are three interrelated pieces of evidence  
18 on this screen in front of you.

19 Slide 46.

20 First, these two phone calls. "any idea who the ADs  
21 will be in the Banking Group?"

22 OK. So asking about that Banking Inspection Group.

23 And, second, the 3:23 phone call where he says  
24 "grocery list."

25 And then, third, the actual handwritten notes of Cindy

1 Holder, which include the list of the members of the Banking  
2 Inspection Group.

3 Let's talk about how these are all connected.

4 These are Cindy Holder's notes. Three things right  
5 off the bat about the notes. First is that it's a photograph  
6 and that the metadata on the photograph shows that the  
7 photograph was taken at 7:45 p.m. We heard testimony that the  
8 metadata recovered with this photograph confirms this. It is  
9 not in dispute, both sides agree, that's when the photo was  
10 taken.

11 Second, both sides, the government and Mr. Wada,  
12 Mr. Wada agree that the document reflects the notes that Cindy  
13 Holder took during a conversation she had with Jeff Wada. We  
14 don't dispute that.

15 It's clear as day that that's what they're about  
16 because they make specific references to Jeff Wada in the notes  
17 themselves. In fact, if you look closer at the list of  
18 inspectors, these little comments that Cindy wrote about, you  
19 know, friend of Jeff, or Jeff's sense of humor, it's clear that  
20 the information came from Mr. Wada.

21 And by the way, there is no evidence at all that this  
22 is confidential. No one testified to that. Because that's not  
23 an issue. And he hasn't been charged with giving over the list  
24 of inspectors in the Banking Information Group.

25 So, third, this is not the inspection list. We know

1 that for certain. Mr. Sweet testified to that: "This is not  
2 -- Government Exhibit 1444, this is not the inspection list,  
3 correct?

4 "A No."

5 So we know three things: We know that there was a  
6 call at 2:23 -- excuse me, 2:24 between Cindy Holder and Jeff  
7 Wada. We know that Jeff Wada gave her the names on the banking  
8 Inspection Group, and we know that she wrote those names down  
9 in her list.

10 So we're left with this mystery: If Cindy asked for a  
11 list of the people in the Banking Inspection Group at 2:45 and  
12 Jeff Wada left her a voicemail saying he has the grocery list  
13 about an hour later, at 3:23, if later that same day, at 7:02,  
14 they have their first 29-minute phone call, if all those things  
15 are true, then what the government's evidence shows is that the  
16 "grocery list" could not refer to inspection list.

17 How do we know that? Brian Sweet said that he had --  
18 she had two pages of notes. She had the list, the inspection  
19 list, and she had the notes of the Banking Inspection Group.  
20 The other list, he claims, well, he can't remember if he took a  
21 picture of it, and we haven't seen it. So, we don't have any  
22 idea if it actually exists other than what Brian Sweet said.  
23 The government certainly didn't produce a picture of it or a  
24 copy of those notes.

25 And think of the remarkable coincidence that that

1 implies. Cindy Holder, according to Brian Sweet, has a  
2 conversation with Jeff Wada in which he gives her two piece of  
3 information. She writes down the names of the Banking  
4 Inspection Group, and supposedly she writes down the names of  
5 the inspection targets, but that's the one list that we don't  
6 have, the one list we don't have a picture of. In fact,  
7 Mr. Sweet testified he couldn't even remember if he took a  
8 picture of it.

9 His explanation for why he didn't take a picture was  
10 that he wrote it down himself on the outside of a manila folder  
11 so there was no need to take a photo. According to Mr. Sweet,  
12 that manila folder is this exhibit here. The only notes we  
13 have of the 2017 preliminary inspection list are written in Mr.  
14 Sweet's own handwriting.

15 And that brings us back to Government Exhibit 1362,  
16 that summary chart.

17 I told you that you would see that Brian Sweet was  
18 lying to you about this, about Mr. Wada being the source and  
19 about the "grocery list" referring to an inspection list. To  
20 see the lie, we need to fill in the gaps on the government's  
21 chart.

22 First, the government's first mention of what Brian  
23 Sweet was doing that day comes at 7:45 that night when he took  
24 a picture of the notes.

25 Oh, we know Brian Sweet was working that day. In



1 fact, Brian Sweet had lunch with -- you could probably guess --  
2 that day Bob Ross. The same day that Brian Sweet claims that  
3 Jeff Wada gave Cindy the inspection list, he's meeting with Bob  
4 Ross, his good friend, and the person that he acknowledged  
5 receiving confidential information from him in the past.

6 Right here in the emails: "That would be great, Bob.  
7 Let's definitely do it again next month." Date, January 9,  
8 2017.

9 "Brian, it was really good seeing you today."

10 No question that they actually met that day and that  
11 that lunch took place at lunchtime. In fact, there was quite a  
12 bit of testimony about when that lunch took place.

13 This was not a spur-of-the-moment get together. They  
14 had arranged it five days earlier. And while Brian Sweet and  
15 Bob Ross were having lunch, Cindy Holder let Brian Sweet know  
16 that she wanted to talk with him when he got back from lunch.

17 You see that in her email. This email is kind of hard  
18 to tell because she doesn't put any text in the body of the  
19 email, she just writes on the subject line. But you can see  
20 the subject line, "Let me know when you get back from lunch,"  
21 two exclamation marks. Mr. Sweet explained that he actually  
22 got back from lunch not at 5:45 in the evening but, because of  
23 the UTC Time zone issue, it was actually 12:45, and that he  
24 told Cynthia to come by his office.

25 Can we confirm that? Yes. Sweet's testimony:

1 "What email did you send Cindy Holder when you were  
2 back in your office on January 9th?

3 "A I responded by saying: Just got back. Swing by whenever  
4 you are free to catch up (and would you mind if I borrowed your  
5 Tide-stick).

6 "What happened after you sent the email?

7 "I remember her coming to my office."

8 This is cryptically important. 12:45, Cindy Holder,  
9 Brian Sweet meet in his office after he gets back from lunch  
10 with Bob Ross.

11 And we know, to remove any doubt, that this meeting  
12 actually took place because Mr. Sweet was bringing Cynthia  
13 Holder back a venti, vanilla, non-fat latte. Confirmed it by  
14 emails. Confirmed it via text message. Confirmed it via  
15 appointment. There is no question that this meeting between  
16 Brian Sweet and Cindy Holder actually took place.

17 Now, what does Mr. Sweet claim happened at this  
18 meeting with Cindy Holder?

19 "Lunchtime is your recollection?

20 "Yes, just after I got back from lunch."

21 Holder said she had spoken with Mr. Wada, and that  
22 Jeffrey Wada had given her information about PCAOB inspectors,  
23 as well as a preliminary listing of who the PCAOB was planning  
24 to inspect in 2017.

25 Why is that important? Because this grocery list

1 voicemail didn't come until hours later. The "grocery list"  
2 term could not refer to an inspection list because, according  
3 to Mr. Sweet's sworn testimony, he already received the  
4 inspection list from Cindy Holder and she had already received  
5 it from Mr. Wada in the morning.

6 It was all a lie. Demonstrably false.

7 You didn't see this laid out for you in the trial or  
8 in summation because of these blinders, the single-minded focus  
9 to only show you text messages and emails and phone records  
10 that fit Brian Sweet's story that has been adopted by the  
11 government, and to ignore everything else.

12 Ladies and gentlemen, this is incontrovertible  
13 evidence that Brian Sweet lied to you right there when he said  
14 Cynthia Holder told him "grocery list" meant inspection list.  
15 It could not have meant that.

16 The first phone call on January 9th in which Cindy  
17 Holder speaks with Jeffrey Wada is not until 7:02 p.m. that  
18 night.

19 So Brian Sweet's testimony that he got the list from  
20 Cindy Holder in his office right after lunch -- false. The  
21 phone records that the government put in front of you, but  
22 didn't highlight this, show that they didn't even speak until  
23 7 o'clock that night. Which makes sense because the list, the  
24 metadata on this Banking Inspection Group list, is not until  
25 7:45.

1           There are no communications -- none -- of any kind on  
2     January 9, 2017 between Cindy Holder and Jeffrey Wada until  
3     Cindy sends Jeff that text message at 2:24 p.m., after Sweet  
4     says he already received the list.

5           Who did Brian Sweet get that list from? Is it really  
6     that big of a leap to conclude that he got the list from Bob  
7     Ross? The guy he had lunch with that day. He just twisted the  
8     facts a little bit to implicate somebody else. But he got  
9     caught up in those lies. Not even Brian Sweet could keep track  
10    of all of his lies and he got caught.

11          That's why the government's summary chart, GX1362,  
12    skips over this lunch meeting altogether, even though it was  
13    the most important part of Mr. Sweet's testimony about what  
14    happened this day. They realized, I don't know when it  
15    happened. He testified that it happened in the morning. I  
16    don't know, when they were putting the chart together and all  
17    of a sudden the dates and the times don't match up and so they  
18    just left it off altogether and it starts in the afternoon.  
19    They completely omit the fact that Brian Sweet testified in a  
20    way absolutely 180 degrees contrary to their theory of the  
21    case.

22          Now, even if you set Brian Sweet's perjury aside, his  
23    story falls apart in other ways as well. For example, as you  
24    just saw, the only call from Jeff Wada and Cindy Holder was at  
25    7:02. It lasted 28 minutes. We confirmed that with the actual

1 phone records, not just the government summary chart.

2 You can see it here, adjusted for UTC, 7:02 p.m., 28  
3 minutes.

4 What do we know about this 29-minute phone  
5 conversation? Let's look more closely at Cindy Holder's notes,  
6 the ones written in red text.

7 There are lots of notes on here that don't relate  
8 directly to the members of the Banking Inspection Group. So,  
9 for example, this particular comment, I believe Brian Sweet  
10 testified this related to Jeff Wada speaking to this Bob, who  
11 may be a former employee of KPMG and maybe getting a referral  
12 as part of his effort to get a job possibly at KPMG, so they  
13 talked about that.

14 They talked about his not getting promoted. We see  
15 those comments there, which the government highlighted.

16 We also see that -- and we numbered them. There are  
17 35 names on this list. And they are not just names. They are  
18 full names, but there are also comments about many of them.  
19 Like, for example, one of the woman is Wada's friend and  
20 another guy is friendly, Wada's sense of humor. So they  
21 actually talked about these people in addition to all the other  
22 things that they discussed as reflected in this note.

23 How long was this call? It was 29 minutes.

24 If you believe Brian Sweet's testimony -- well, let's  
25 set his testimony aside. If you believe the government's new

1 theory, that it was during this call at 7:02 in the evening  
2 that Mr. Wada conveyed the inspection list to Cindy Holder,  
3 that's a tall order given the volume of information just  
4 reflected in these notes alone; that in addition to that, they  
5 were also discussing the inspection targets.

6 Now, we don't know for sure. We weren't on the call.  
7 It is not Mr. Wada's job to prove himself innocent. It is the  
8 government's job to prove beyond a reasonable doubt that he was  
9 the source. We've shown that he wasn't. And we've shown that  
10 their cooperator is a liar.

11 What else was going on during this time period that  
12 could account for why Jeff Wada would be talking with Cindy  
13 Holder? A woman who, you remember, he considered his friend.

14 Take a look at slide 66. There are some redacted  
15 portions of this document, but you see a couple of dates in the  
16 left-hand column, January 9 and January 13. We don't know what  
17 they were talking about, but we do have a stipulation that the  
18 parties entered into about certain medical appointments and a  
19 medical condition that Mr. Wada had at this time. We know on  
20 January 9, 2017, Mr. Wada had a medical appointment with a  
21 cardiologist. We know on January 13th, he attended a medical  
22 appointment with a cardiac surgeon in Fountain Valley, and that  
23 eventually these appointments would lead to cardiac surgery in  
24 February.

25 So, again, I wasn't on the call. We don't have a

1 recording. None of us were. None of the participants, you've  
2 heard from none of them. But to suggest that part of that  
3 conversation also included a conversation about his medical  
4 condition, again, this is not a long phone call, but the idea  
5 that in addition to all of this conversation they also had a  
6 conversation about the inspection list doesn't make any sense.  
7 It is demonstrably false for the reasons we talked about. But  
8 even if you set that aside, it also doesn't hold up, it doesn't  
9 make sense.

10 And I would submit to you, ladies and gentlemen, that  
11 medical appointments of this nature, that ultimately led to  
12 heart surgery, is the kind of condition or event or  
13 circumstance that might cause someone to write in a text  
14 message to a friend, "I need to talk." January 9th is the day  
15 those notes were made. January 9th is the day Mr. Wada had an  
16 appointment with his cardiologist. Is it really that big of a  
17 stretch to think that he needed to talk to her because of this  
18 thing that he's experiencing, talk to his friend? It is not.  
19 When you compound that with all of the other evidence that it  
20 wasn't him and that it was someone else in particular, that is  
21 what reasonable doubt looks like. That is it. And that is the  
22 January 2017 preliminary inspection list.

23 Now, they also showed you a couple of other things.

24 They showed you Jeff's email to Cindy Holder after  
25 this in which he expresses his frustration, in Jeff Wada's own

1 colorful way, with being passed over for promotion and Jeff  
2 wanting a job. This email comes late in the evening  
3 January 9th, if we account for the time change.

4 Is this evidence of a crime? Is this evidence of a  
5 conspiracy or a motive? The fact that someone who has been  
6 passed over repeatedly at PCAOB is obviously unhappy, is going  
7 through a significant life event with his health conditions,  
8 that he might look at the possibility of getting another job  
9 somewhere else where he could make a lot more money? Is that  
10 evidence of a crime? Or a motive? When we saw résumé after  
11 résumé after résumé that circulated through KPMG, does that  
12 provide a motive for all of those people to steal information?  
13 Not on its own, no. And knowing what we now know about the  
14 events of January 9th, we know this was not -- this document,  
15 his résumé and his rants about his problems at work, was not  
16 evidence that he was stealing anything.

17 Is Mr. Wada angry, bitter about his employer? Maybe.  
18 It sounds like it. He expresses it in his own way. But what  
19 happened after he sent his résumé to Ms. Holder is significant  
20 because it leads us to what happens in February. Cindy Holder  
21 forwards Mr. Wada's résumé on. She forwards it to her KPMG  
22 email account, and then she forwards it to Brian Sweet. There  
23 is no content in her email at all. She just forwards it blank  
24 to Mr. Sweet, without any comment.

25 And Brian wrote back to Cindy 20 days later. First



1 sentence, Brian says, on January 30: "Cindy, Jeff's résumé  
2 looks extremely strong to me. What a solid background. I  
3 can't wait to get him on board!!!"

4 Three exclamation marks.

5 Was any of that true?

6 Here is what Mr. Sweet said:

7 "Why did you write that?"

8 Speaking of that email.

9 "Because I knew that Cindy would take my feedback on  
10 his résumé and whatever I wrote and forward that directly to  
11 Jeff Wada.

12 "Did you actually feel positive about the prospect of  
13 Jeff Wada leaving the PCAOB and joining KPMG?

14 "No, I did not."

15 That's Brian Sweet. The guy is running so many cons  
16 and so many scams, it's hard to keep track of all of his lies.  
17 But even then they begin to unravel, as we've just seen with  
18 regard to what happened on January 9th.

19 But if you are willing to take shortcuts and put  
20 blinders on to all of the evidence in context, you can see how  
21 you can cobble it together to create an impression that he's  
22 doing something wrong, or, more specifically, to create the  
23 impression that he's stealing the inspection list. When if you  
24 look at everything in context and you are willing to set aside  
25 your wholehearted devotion to Brian Sweet, you begin to see

1 that there are a whole host of other even more likely  
2 explanations for what's going on.

3           So, here's the other important point about that email  
4 that we just looked at, that rant by Jeff Wada where he is  
5 complaining about his job. Brian Sweet saw that. Right?  
6 Because Cindy Holder forwarded it to him. He knew that  
7 Mr. Wada trusted Cindy Holder. So when Mr. Sweet's world was  
8 collapsing around him just a month later, how far do you think  
9 it was for him to think about Jeff Wada, his relationship with  
10 Cindy, his bitterness at his employer, and how with just a few  
11 more lies Jeff would make an easy mark, an easy person to point  
12 the finger at? I'm not going to try to get into the head of a  
13 guy like Brian Sweet, but it doesn't take a great stretch of  
14 the imagination that he would try and point the finger away  
15 from his friend Bob Ross and point the finger at somebody else,  
16 and that's exactly what he did.

17           But there is one last piece of evidence or information  
18 that the government showed you about this January 9th date.  
19 This is an access log for IIS, Inspections Information System.  
20 This is computer system or the database where PCAOB inspectors  
21 keep all of their inspections-related information.

22           And this, as the parties stipulated -- you can see it  
23 right there -- paragraph 3 of the stipulation: We agree that  
24 this is a true and accurate record Mr. Wada's logins to IIS  
25 between January 2016 and March 2017. And we have highlighted

1 here just the January 9th entry because that's what the  
2 government is focused on.

3 But continuing on with the stipulation: The login  
4 times represent Mr. Wada's initial logins to IIS on the dates  
5 described and do not indicate any particular access to a  
6 specific workspace within IIS, such as the KPMG U.S. workspace.  
7 IIS does not record a user's access to a specific workspace  
8 within IIS or logout times.

9 And then it is the times there are in Central Time.

10 What is the significance of this document? The  
11 government has proven through this document that Mr. Wada  
12 logged into his computer system on January 9th. That's it.  
13 Tells us nothing. Tells us less than nothing. Since the  
14 government, who knew Mr. Sweet was having lunch with Bob Ross,  
15 failed to shown us the IIS logins for Mr. Ross for that day, or  
16 anyone else, for that matter, or give us any indication that  
17 they checked the logins, for whatever they're worth.

18 MS. MERMELSTEIN: Objection, your Honor.

19 THE COURT: Sustained.

20 MR. COOK: Where does this leave us with the 2017  
21 preliminary list? I'm tempted to say that this is what  
22 reasonable doubt looks like, but it's more than that. Brian  
23 Sweet's lies have been proven, proven beyond a reasonable  
24 doubt. We've shown that the carefully tailored timeline that  
25 you were shown omits the context necessary to evaluate the

1 evidence properly, fully. The only thing about the 2017  
2 preliminary inspection list that has been proven is that it  
3 didn't come from Jeff Wada, and that Brian Sweet, again, is  
4 lying.

5 Let's turn to the 2017 final inspection list.

6 Count Five of the Indictment alleges that Jeff Wada  
7 was the source of the 2017 final inspection list and that  
8 according to the government -- really, according to Brian  
9 Sweet -- Jeff Wada gave Cindy Holder the list on February 3rd,  
10 2017. Wrong again.

11 Look at slide 72. For this, to discuss the final  
12 inspection list, I am going to break it into two components. I  
13 will talk about the statements of Brian Sweet about what  
14 happened, and then everything else -- the phone records, the  
15 text messages, the voicemails.

16 And why am I doing that? I'm doing it to emphasize  
17 the point that without Brian Sweet's testimony, the everything  
18 else tells you nothing about who the source of the inspection  
19 list is.

20 Now, let's take a look at the next slide. This is the  
21 IIS login screen again, which also includes entries in through  
22 February. And as you can see, highlighted are entries from  
23 January through February 1.

24 And if you look here, you can see all of the entries  
25 just for the month of October 2016.

1           Now, why did I show you October of 2016? It doesn't  
2 really have anything to do with the 2017 list? To highlight a  
3 point. There are what, 30 or 40 separate logins to IIS in  
4 October of 2017 -- 2016 by Jeff Wada. In January and February  
5 there are very, very few. And in February there is only one,  
6 on February 1st. And the point of that is the government has  
7 highlighted the fact that he locked into IIS on February 1st  
8 and the fact that there are very few other logins during that  
9 time period suggests that there is something significant about  
10 that, when there is not.

11           The reason why there are very few, you can infer for  
12 yourselves, and that is he was getting ready to have heart  
13 surgery in just a couple of days. February 1 was his last  
14 login. He had heart surgery about a week later. So the fact  
15 that there is only one login on February 1 does not make it any  
16 more important than any other particular login. The only  
17 reason there is few of them is because of what was going on in  
18 his life.

19           So scroll up to -- we talked about the October  
20 entries. Let's take a look at slide 75.

21           The government showed you this document. This  
22 purports to be a screenshot from Mr. Wada's laptop. The  
23 government claims that during his February 1, 2017 IIS login,  
24 the one they showed you from the IIS records, they claim that  
25 he logged in and downloaded all of these documents reflected on

1 this screenshot right here. And the government claims that it's  
2 from these documents that Mr. Wada gave -- came up with the  
3 final inspection list and gave it to Cindy Holder on  
4 February 3, 2017.

5 Now, this is another example of the government taking  
6 unrelated normal business activity and converting it into  
7 evidence of a crime. So let's talk about this document itself,  
8 the one on the screen.

9 What did we hear about it? First, there was the  
10 testimony of Chris Ren. Chris Ren was the IT person who  
11 supposedly handled this electronic data. And I don't need to  
12 remind you. Obviously, this is a federal criminal trial, and  
13 the evidence in a criminal trial is, to say the least,  
14 important.

15 Let's read Mr. Ren's testimony about his background  
16 and expertise. And I want to emphasize here, I'm reading from  
17 a transcript. English is not Mr. Ren's first language, so I am  
18 in no means trying to mock his English. I simply want to  
19 identify the credentials of the person that the government  
20 used, or the PCAOB used, to extract this data from Mr. Wada's  
21 computer.

22 "Did you receive any formal training in criminal  
23 investigative techniques?

24 "We received training in computer forensics as part of  
25 information security.

1 "How long was your training?

2 "I attended training on various occasions in a  
3 security conference.

4 "A conference?

5 "Security conference, you know you have trainings,  
6 yes. Not, you know formal like, you know, year-long training  
7 but computer forensics in training for, like, offered by, you  
8 know, security conference.

9 "So what conference?

10 "RSA Security.

11 "But it was one conference that you are talking about,  
12 correct?

13 "Yes."

14 Now, what about the preservation of evidence?

15 So why are we asking Mr. Ren this? We're asking  
16 Mr. Ren this because he is the one that handled Mr. Wada's  
17 computer and that from that computer the government claims this  
18 document, that screenshot as well as the documents identified  
19 in that screenshot, were extracted. And they claim that that  
20 is evidence supporting Mr. Wada's guilt, that he obtained the  
21 inspection list from those documents. So his manner of  
22 handling his computer is very important.

23 Asking about training on preservation of evidence:

24 "Did you learn anything at that conference about the  
25 preservation of evidence?

1 "Preservation, I think I know it in general.

2 "Just generally?

3 "I know it. I don't need to, you know, go to a  
4 conference to know that I know preservation of evidence. It is  
5 kind of common sense.

6 "I'm sorry. What is common sense?

7 "To, you know, preserve evidence through technical  
8 means to make sure, you know, that evidence will be intact and  
9 it can be, you know, forensically sound in a situation like,  
10 you know, this court.

11 "So since it is common sense they didn't teach  
12 preserving evidence in a formal way at that conference,  
13 correct?

14 "They just nominally mention it because your  
15 instructor just mentioned like, you know, common sense, you  
16 need to keep evidence, you know, intact."

17 So let's go to slide 79.

18 This is the testimony of Zach Greenwood.

19 I show you the testimony of Zach Greenwood not because  
20 he had anything to do with the extraction of data from the  
21 laptop computer but just simply to compare the level of  
22 expertise of these two individuals.

23 "How many times have you testified in court?

24 "Well over 30 times. I've lost count.

25 "How many criminal cases?



1 "They have all been criminal.

2 "You received hundreds of hours of forensic training  
3 primarily from your prior employers, correct?

4 "Correct.

5 "Dozens upon dozens hours of training from the  
6 National White Collar Crime Center in digital forensic  
7 acquisition and analysis as well as from" -- and then a list of  
8 other places.

9 "Yes, sir."

10 (Continued on next page)

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1           Why was Mr. Wada's laptop handled so sloppily? Why  
2       didn't it merit the type of attention, the kind of credibility  
3       and care that would come from someone with the expertise and  
4       training of someone like Zach Greenwood, who handled Mr.  
5       Middendorf's phone?

6           Let's set that aside and go back to the screenshot.  
7       Let's assume what we are looking at here actually came from Mr.  
8       Wada's computer. Mr. Ren testified that to find documents in  
9       this folder location -- you can tell this is a folder location  
10      if you look at the top of the screen. It is says computer,  
11      then local disc J, then users, then WadaJ, my documents, and so  
12      on. You have the file path from where these documents were  
13      found.

14          He said he found these documents using search terms.  
15      He also testified that he doesn't know what those search terms  
16      were. He did clarify on redirect that all the files found in  
17      this particular folder are contained in this screenshot.

18          However, we don't know what other documents may have  
19      been on his computer that would be relevant to this case  
20      because we don't know what search terms were used to screen  
21      those documents. He couldn't tell us. Maybe that wouldn't be  
22      such a big deal if Zach Greenwood were the person handling this  
23      computer and had been the one conducting the analysis. But it  
24      wasn't him, so it's a problem.

25          As of February 1, looking at the document and

1 accepting it at face value, it indicates that Jeff Wada was  
2 assigned to PWC's planning group. Look at the file tab:  
3 WadaJ/my documents/inspections/2017/PriceWaterhouseCoopers/  
4 PWC/ -- we know he was assigned to PWC -- admin/planning. What  
5 is the name of the file in which these documents are found?  
6 "Examples from other firms."

7 Mr. Wada's résumé confirms that he was doing planning  
8 work at PCAOB. Mr. Wada was involved in planning for PWC,  
9 which is one of the Big Four accounting firms, we know that as  
10 well. If we believe what is reflected in the documents -- go  
11 back -- then according to Ms. Rodriguez's testimony, the very  
12 first document there, Copy of EY2017 refers to Ernst & Young,  
13 one of the Big Four accounting firms. Mr. Wada is not accused  
14 of leaking information to Ernst & Young.

15 More importantly, when the government put the  
16 documents on this page into evidence, it did not provide the  
17 copy of the Ernst & Young document. It didn't fit their theory  
18 that the only --

19 MS. KRAMER: Objection, your Honor.

20 THE COURT: Overruled. It's argument.

21 MR. COOK: It didn't fit their theory that the only  
22 reason Jeff Wada was downloading these documents was to get the  
23 KPMG inspection list if he is also downloading Ernst & Young  
24 documents. But it's there.

25 Ms. Rodriguez testified "EY" refers to Ernst & Young.

1           If we choose for a moment to apply the presumption of  
2   innocence that he is entitled to and assume that Mr. Wada is  
3   not engaged in a criminal conspiracy, why, why could he be  
4   downloading these documents? What would explain that? The  
5   answer is plain as day, written right on the document itself:  
6   examples from other firms.

7           If you're working on planning for PWC, is it too much  
8   of a stretch to think it might be nice to see how the planning  
9   documents for the other two firms, E&Y and KPMG, have  
10   structured their documents? Call it a template or a blow-by.  
11   We don't know the answer. We are speculating. But the  
12   government would just have you assume there is a criminal  
13   purpose to this. There are other reasonable alternatives.

14          The fact that Ms. Rodriguez testified that she  
15   couldn't think of a reason why in her experience someone from  
16   PWC's planning team would have a copy of another firm's  
17   planning profile does not turn possession of those documents  
18   into a crime.

19          In fact, Ms. Rodriguez was very specific. She  
20   couldn't think of a reason why someone would do that because  
21   the information in these documents would be specific to the  
22   firm for which they were created. That has nothing to do with  
23   the structure of the document itself, how it is laid out, how  
24   it is organized, and how that might help somebody who is  
25   creating similar documents for the firm they are responsible

1 for.

2 This is not evidence of a crime. It's an assumption  
3 that the government would have you make that assumes already  
4 that he is engaged in criminal activity and then force you to  
5 accept this as part of that theory and in support of it.  
6 That's backwards. He is presumed innocent first. We look for  
7 reasonable, noncriminal explanations for what's going on. If  
8 they are ruled out beyond a reasonable doubt and all we are  
9 left with is a criminal explanation, then fine, the evidence is  
10 what it is. But that didn't happen here.

11 Let's go to the next day. This is February 1st. Keep  
12 in mind it is on February 1 that the government believes Mr.  
13 Wada has downloaded the final inspection list. Now February 2.  
14 Let's take a look at the time line that the government created  
15 for February 2. That is their document.

16 What is the context of the conversation that is  
17 missing here? Take a look to your left. This is the  
18 government's summary.

19 "Are you flying home tonight?

20 "Yep, on board the plane now.

21 "How are you doing?" That's Holder.

22 "Landing 8:30. I'm okay. Getting close to the day.

23 "If you have a chance to talk tomorrow, I can fill you  
24 in."

25 Holder: "It is. You got this.

1 "I know, just know, know it. I remind you I'm a  
2 know-it-all.

3 "You got it. Call when you want. I'll be up."

4 Is she talking about the top secret final inspection  
5 list for 2017 or is she talking about the medical appointments  
6 and the surgery that is imminent for Mr. Wada in just a couple  
7 of days and the fact that just the day before he had had a  
8 diagnostic test in connection with that condition? Again,  
9 without the context, assumptions are easy. Without the  
10 context, you can cram this into whatever theory you want.

11 Cindy Holder appears to provide words of  
12 encouragement. Less than a minute later, Mr. Wada says, "Okay,  
13 I have the grocery list and all the things you'll need for the  
14 year," immediately followed by "safe travels."

15 Let's talk again about that phrase "grocery list."  
16 This is the second we have seen it, the first time being in  
17 connection with the list of inspectors in PCAOB's banking  
18 group. What do I mean by that? Remember, the first time we  
19 saw "grocery list" in these text messages was in the context of  
20 not the preliminary inspection list but banking inspection  
21 group and the list of names in the red text on her notes. It  
22 didn't have anything to do with an inspection list. But now he  
23 is using that phrase again.

24 Here is where I come back to the problem of trying to  
25 put yourself in the shoes of two people that you don't know.

1 You don't know how they communicate. You don't know what they  
2 are talking about. You don't know their inside slang and  
3 jargon, their jokes, when they are serious. You don't know  
4 anything about them.

5 It is easy for a prosecutor to come up and say of  
6 course "grocery list" means inspection list, what else could it  
7 mean. The answer is it could mean just about anything. I have  
8 no idea, neither do you, neither do they. The only person to  
9 tell you anything at all about what it means is Brian Sweet.  
10 That's why I separated him from this discussion about the 2017  
11 final list.

12 Set him aside and just look at the other evidence.  
13 Does it tell you anything about an inspection list? Only if  
14 you accept the idea that the government has tried to plant in  
15 your head from its opening statement, "grocery list" means  
16 inspection list, grocery list is a secret code, instead of  
17 "grocery list" means just some jargon or slang that gets tossed  
18 around loosely. Or maybe it relates to something related to  
19 work. But there is no evidence that it relates to a top secret  
20 inspection list.

21 Let's speculate for just a second. Let's talk about  
22 what else "grocery list" could mean and let's do it in the  
23 context of what might make sense given the evidence in this  
24 case. What kind of lists were Cindy Holder and Brian Sweet  
25 creating that we have talked about and that we know Jeff Wada

1 was involved in? Recruiting lists. They talked about it all  
2 the time. It was important. Brian Sweet testified it was an  
3 important part of his job.

4 We saw those three lists that he created that he said  
5 was a living document evolving over time. We know that Cindy  
6 Holder was furthering his efforts and she stood to make a lot  
7 of money doing it if she was successful in writing a lot of  
8 people on board. Do we know beyond a reasonable doubt that  
9 "grocery list" refers to recruiting? Of course not, anymore  
10 than we know beyond a reasonable doubt that it refers to an  
11 inspection list.

12 But let's play that out. What is a grocery list in a  
13 literal sense? It's a list of items that you want to go shop  
14 for. Does that fit with a recruiting list, people you want to  
15 go shop for at the PCAOB? Yes. We are way into speculation  
16 territory, we are way into reasonable doubt, but it is the same  
17 thing the government is asking you to do.

18 I plant that idea in your head that it has to do from  
19 recruiting. Do that from the beginning and reinforce it over  
20 and over again and don't give you any other context that it  
21 could suggest to you that it has any other meaning, and pretty  
22 soon you just assume that that's what it is. I don't know what  
23 it means. Recruiting list makes as much sense as literally  
24 anything else.

25 One thing I would say, I don't think it is as the



1 government suggested. I don't think it actually referred to  
2 groceries, given the relative distance between their two  
3 houses.

4 So you've got Brian Sweet and Cindy Holder shopping  
5 for PCAOB recruits. We don't know that's what they are doing  
6 here. They are making list of their top choices, their own  
7 grocery lists. Cindy Holder just a few weeks earlier asked  
8 Jeff Wada for a list of PCAOB inspectors which he refers to as  
9 a "grocery list," so we actually know that on one prior  
10 occasion Jeff Wada referred to a list of PCAOB inspectors as a  
11 "grocery list," that big group, the banking inspection group.

12 Again, the term makes sense, the timing makes sense.  
13 Beyond a reasonable doubt, definitely not. The same as the  
14 government's attempt to pin "grocery list" on the 2017  
15 inspection list: pure speculation.

16 But let's take the government's suggestion at face  
17 value for a moment. Assume Mr. Wada's grocery list was the  
18 inspection list. The time line still doesn't work. It still  
19 falls apart. We need some context.

20 The inspection list, as you have heard, is supposed to  
21 be the most confidential of documents that the PCAOB has. Ms.  
22 Hannigan's testimony, I think you heard it in the summation:  
23 "That has the most black-and-white answer you could have  
24 because that is such a highly sensitive information, it is  
25 clear that you cannot leak that list."

1 According to the government, Jeff Wada downloads the  
2 crown jewels of the PCAOB, the 2017 inspection list. When? On  
3 February 1, 2017. The IIS log begins, the laptop screenshot  
4 that shows the created date of the files all being February 1,  
5 while he is getting ready to have heart surgery, as we know.

6 What does he do with this most valuable and I should  
7 say time-sensitive information? Remember, these audits are  
8 open right now. This list has the most value while those  
9 audits are open. What does he do with it on February 1? He  
10 does nothing.

11 Jeff Wada is, according to the government, neck deep  
12 in a vast conspiracy to defraud the United States government,  
13 the Securities and Exchange Commission, a conspiracy to defraud  
14 the PCAOB with a bunch of KPMG strangers. He's desperate, the  
15 government alleges, to make good with the people at KPMG to get  
16 a job. He downloads the single most valuable piece of  
17 information that KPMG could possibly want and that PCAOB has.

18 And he sits on it, if you follow the time line, until  
19 when? The following evening, February 2nd. Even then, the  
20 conversation, if you believe "grocery list" means inspection  
21 list, is incredibly casual for someone who has the crown jewels  
22 in his back pocket and wants to let Cindy Holder know that. Is  
23 she ecstatic? We know how she likes exclamation marks, and we  
24 don't get many here, only two.

25 Surely she called Brian Sweet. After all, Brian Sweet

1 told you that Cindy Holder told him that "grocery list" meant  
2 inspection list back in January. That was a lie, but let's go  
3 with it.

4 So Brian Sweet knows in his mind "grocery list" means  
5 inspection list. Cindy Holder gets the secret code from Jeff  
6 Wada: I got the grocery list. Surely there's a phonecall, a  
7 text message, an email, some contact between Cindy Holder and  
8 Brian Sweet to say, I got it, it's coming, I got the code,  
9 message received, I'll be talking to Wada, I got the list.  
10 Nothing.

11 The next day Cindy Holder texts Jeff, says that she is  
12 free to chat whenever. No response for about an hour and a  
13 half. No phonecalls, no are you there, are you able to call  
14 me. Nothing. No follow-up text. No calls or texts to Brian  
15 Sweet saying, I'm getting the list today, get ready, call  
16 Whittle, call Britt to let them know it's coming. Nothing. As  
17 you have heard, this is the single most important document that  
18 could be obtained for KPMG from the PCAOB.

19 They finally talk for 47 minutes. There are no notes  
20 of the call where supposedly all of this information, all  
21 information that is on this folder, was conveyed to Cindy  
22 Holder, as well as a discussion of Mr. Wada's upcoming heart  
23 surgery, which is what prompted the whole text exchange to  
24 begin with.

25 I am referring to Mr. Sweet's notes here because it is

1 the only record we have of what purports to be the final  
2 inspection list as received from Cindy Holder. All that  
3 information there was conveyed, according to the government and  
4 their theory, by Jeff Wada to Cindy Holder in a 47-minute  
5 phonecall. Again, no notes, contemporaneous notes, from Cindy  
6 Holder at all. All we have were Sweet's notes.

7 In another remarkable coincidence, Cindy comes into  
8 his office in January in New York. Remember what happened  
9 here. This is interesting. In the January incident Cindy goes  
10 into Brian Sweet's office after lunch and she says, according  
11 to Brian Sweet, I got the list, here it is, the names, and he  
12 just grabs a folder that's nearby and that's why it's written  
13 on there. That's in New York.

14 Now Sweet is in California. He gets another phonecall  
15 from Cindy Holder. And what just happens to be the folder  
16 laying around in California? The same thing. Seems remarkable  
17 to me. Is it evidence of anything? Not really, other than  
18 there are a lot of coincidences that float around Brian Sweet.

19 Following the government's time line, Ms. Holder  
20 conveys all the information that she got from Mr. Wada to Mr.  
21 Sweet in a 31-minute call a short time later. Then, according  
22 to Mr. Sweet, he conveyed the information to Mr. Whittle in a  
23 7-minute 55-second phonecall. That's what he said. This is  
24 Mr. Sweet,

25 "So, after you wrote this document on February 3rd, or

1 most of it," that's in evidence as Government Exhibit 655,

2 that's the folder, "what did you do next?

3 "A. I called Tom Whittle.

4 "Q. What did you tell him?

5 "A. I told him that we had received the full list of where the  
6 PCAOB was planning to inspect in 2017.

7 "Q. In sum and substance what did he do?

8 A. He was very glad to have received it. He asked me for the  
9 names, and I, you know, read him down not only the names of the  
10 focus area -- I'm sorry, the names of the issuers but then gave  
11 him the additional focus areas that had been provided as well,"  
12 in the 7-minute 55-second phone conversation. You decide if  
13 that makes sense.

14 Here is the other problem if you accept the  
15 government's theory and the testimony that they have offered.  
16 Brian Sweet has conveyed the information up the chain of  
17 command. Can we go back to the time line. Brian Sweet  
18 testified that he conveyed the information forward to other  
19 KPMG partners at 3:03 p.m. at the latest because that's when he  
20 sent the calendar invite to Mr. Middendorf and Mr. Whittle in  
21 order to set up a time to discuss the information he had just  
22 received. So we know that at least by 3:03 p.m. he had the  
23 full list.

24 What's going on with the 4:31 p.m. voicemail and  
25 subsequent calls between Wada and Holder about a grocery list

1 where he says, "Boy, was I wrong"? It doesn't fit the time  
2 line. Wada had already given the list to Ms. Holder, and Ms.  
3 Holder had already given the list to Mr. Sweet, and Mr. Sweet  
4 had already given the list on up the chain. They had already  
5 sent out a calendar invite for a meeting to discuss the list.  
6 Yet Mr. Wada sends a voicemail saying, "Boy, was I wrong. I'm  
7 looking at the grocery list," as if he hasn't given it to  
8 anybody, whatever it is.

9           The idea that the grocery list is the inspection list  
10 is pure rank speculation. It's an assumption based on an  
11 assumption that what Brian Sweet told you was truthful. That's  
12 the evidence, physical evidence, in support of their theory  
13 that Wada is the source of the final inspection list.

14           Let's talk about Brian Sweet. This is a photo that  
15 the government introduced into evidence of Mr. Sweet. The  
16 person right there in that photo represents the single most  
17 important piece of evidence disproving the government's entire  
18 case against Jeff Wada.

19           The case rests upon Brian Sweet giving voice to all of  
20 the records that are silent about what they really mean, about  
21 what they are really talking about. That's why he is the hub  
22 of this. That's why he is critical to their case. That's why  
23 they were willing to overlook so much from him in order to keep  
24 him as a cooperator and get his testimony in front of you. The  
25 case doesn't make it through the doors without Brian Sweet to

1 illustrate and narrate and tell you what all of this stuff  
2 means.

3 And he knows it. There is no question that he knows  
4 how badly he is needed, how badly the government wants him. So  
5 I'm going to talk about Brian Sweet for just a couple of  
6 minutes. We have about five minutes.

7 I want to be clear about something that may have not  
8 been clear during the cross-examination. I don't care how many  
9 mortgage frauds he committed. I don't care about his tax  
10 fraud. I don't care about any of the other felonies he  
11 committed. I don't care about any of those crimes, both the  
12 ones he disclosed originally, ones he disclosed late, the ones  
13 he disclosed during trial, the ones he disclosed on  
14 cross-examination. I don't care about the fact that he engaged  
15 in that criminal activity. I'm not a prosecutor. It's not my  
16 job to prosecute him.

17 What I do care about is his credibility, his bias, and  
18 his motive to lie. That's why that testimony was so important,  
19 because it illustrated the problem with relying upon someone  
20 like him. Why did I spend so much time going through all that?  
21 And it was tedious, tedious stuff. Because we have to evaluate  
22 whether he can be trusted. After all, there's a lot at stake.  
23 There's a lot riding on the believability of his testimony. So  
24 we care about his biases, his motivations, and his credibility.

25 I fully acknowledge, as the Court will instruct you,

1 that sometimes you've got to make deals with people involved in  
2 crime in order to prosecute crime. That's just the way it is.  
3 If there's a bank robbery, you sign up the get-away driver to  
4 testify against the other folks. Happens all the time.

5           You will be told, however, that you should consider  
6 their testimony with great care and with particular caution.  
7 That's the standard instruction you get with any cooperating  
8 witness, including Brian Sweet, because they have a motive to  
9 testify falsely because they are getting a benefit from the  
10 government. It is true of any cooperator, certainly of Brian  
11 Sweet, also of Mr. Whittle.

12           But when it comes to Brian Sweet, the problem is  
13 different and much bigger. The problem is not just the  
14 motivation to lie that comes with any cooperating witness  
15 because of what they did before they signed up with the  
16 government. The problem with Brian Sweet is what he did after  
17 he signed up with the government and the response to those  
18 actions.

19           That's why it's so important, and that's what makes  
20 him different from your average cooperator. It is important,  
21 that response from the government to his late disclosures,  
22 because that sends a message to Mr. Sweet as to the value of  
23 his testimony, how badly he is wanted and to what he has to do  
24 to keep the government happy.

25           Let's look at the proffer agreement. You saw this



1 earlier. This is the first agreement that Mr. Sweet signed  
2 when he met with the government. As we talked about earlier,  
3 there were four meetings initially under the proffer agreement  
4 before they even signed him up. His August meetings were very  
5 long. He went on at length. He was asked to disclose all of  
6 his criminal activity. We talked about that. We know that he  
7 didn't disclose it all. He disclosed it piecemeal over time.

8 But we also learned that after these initials  
9 meetings, he was formally signed up. On January 5th of 2018 he  
10 signed the cooperation agreement. That's when the government  
11 decided, we want you, we want you to help with this  
12 prosecution. So he makes a good first impression.

13 Think about what it means, though, when in 30 hours of  
14 interviews in August 2017 with federal agents, trained law  
15 enforcement personnel, that he was able to deceive a roomful of  
16 those professionals with his lies. He lied to them repeatedly.  
17 Could they detect those lies? Obviously not. Apparently not.  
18 If these law enforcement professionals could not detect his  
19 lies, how about the rest of us? We are not trained as they  
20 are.

21 Things go quiet for a while after he signs the  
22 cooperation agreement in January. His next meeting is in  
23 December 2018. The trial is approaching. They need to prepare  
24 him to testify. As we talked about earlier, and I'm not going  
25 to go through it again, he begins a series of disclosures.

1           The defense subpoenas documents that signal to him  
2           that we are about to discover something, so he makes  
3           disclosures to the government. The defense subpoenas more  
4           documents. He finds out he is about to get caught, he makes  
5           more disclosures to the government. He doles it out piecemeal  
6           just the way Cynthia Holder taught him.

7           What do I mean by that? Cynthia Holder, former FBI  
8           special agent, when things were unraveling for them, she got  
9           mad at him about not being careful enough with the tracks he  
10          was leaving. She said with regard to his computer, look, don't  
11          delete everything. That's obvious. Leave some stuff behind so  
12          it is not so suspicious.

13          Mr. Sweet didn't disclose everything. He dribbed it  
14          out only as needed, only when he was about to get caught.

15          You recall that we learned while he was testifying  
16          that he met with the government the evening he was actually  
17          giving testimony to you. It was during that meeting he  
18          disclosed more criminal conduct. Imagine that circumstance  
19          where he has promised and signed a cooperation agreement to  
20          disclose everything, and if he doesn't, the agreement says it  
21          can be canceled and he can be prosecuted; and every time he  
22          makes a new disclosure, they don't tear it up, they go with  
23          him, they keep him, they need him, they want him to testify.

24          Pretty soon as the trial is approaching and the trial  
25          is in progress, that boulder is rolling down the hill so fast

1 it can't be stopped. They have no choice but to continue on  
2 with their guy. No matter what he does and no matter what he  
3 says, they need him to testify and he testified in front of  
4 you.

5 The interesting thing about his direct examination by  
6 the government is that they elicited all the testimony they  
7 wanted from him about all the supposed criminal activity that  
8 Jeff Wada was involved in all before they told you about his  
9 own criminal activity. Only at the end of his testimony did  
10 they describe summarily his own criminal disclosures.

11 It's difficult to even put into words the absurdity of  
12 that situation, to have someone who has lied so many times to  
13 trained professionals who are so desperate to get his testimony  
14 that they overlook it.

15 Ladies and gentlemen, you are the judges of the  
16 credibility of the witnesses. You decide how much weight to  
17 give Mr. Sweet's testimony. That is entirely up to you.

18 You may hear in rebuttal after I sit down that not all  
19 liars are perfect; if they were, they would never get caught.  
20 You heard a hint of that during the government's summation,  
21 where they said the fact that he got some of his facts wrong is  
22 actually evidence that he is being truthful, which defies  
23 logic. But that brings up an important point about just what  
24 kind of a person Brian Sweet is.

25 I'll conclude, your Honor, for the day just after this

1 one.

2 THE COURT: Okay.

3 MR. COOK: There is an old fable that you may have  
4 heard of the scorpion and the frog that pretty perfectly  
5 analogizes the respective relationship between the government  
6 and Mr. Sweet. The story goes that the scorpion approaches the  
7 frog on the bank of a river and wants a ride across the river.  
8 The frog says, I'm not going to do that, you're going to sting  
9 me. The scorpion says, why would I do that? If I sting you,  
10 we both drown. The frog says, well, that makes sense.

11 So the scorpion climbs on the frog's back, they begin  
12 across the river, the scorpion stings the frog. As they are  
13 both going down, the frog says, why did you do that? The  
14 scorpion says, it's just in my nature, it's who I am.

15 This is who Brian Sweet is. There is not a single  
16 aspect, not one part of his testimony that is not riddled with  
17 lies. Even when it doesn't help him, even when he gets caught,  
18 he can't help himself. Even when he knows his cooperation  
19 agreement can be torn up if he doesn't come clean, he still  
20 lies. He doesn't know how not to. That's the man they put in  
21 front of you, the man that they expect you to rely upon to  
22 accept his testimony as gospel in convicting another man of  
23 four felonies.

24 You are the judges of the credibility of the  
25 witnesses. I submit to you you should give Brian Sweet's

1 testimony no weight whatsoever.

2 THE COURT: Ladies and gentlemen, we are going to let  
3 you go for the evening. Thanks for your attentiveness once  
4 again. We will be sitting tomorrow. We will try to start at  
5 9:30 tomorrow morning. We will go until 2 o'clock and then  
6 we'll break.

7 There is also, in addition to the defense closing  
8 arguments, a government rebuttal, and then I'll be charging the  
9 jury in detail as to the law that applies to your  
10 deliberations. That will take a little bit of time, but I  
11 think it is likely that we will reach that point where the jury  
12 can begin deliberating tomorrow maybe around noon, so there  
13 might be a couple of hours of deliberations.

14 However, the jury needs to take as much time as it  
15 needs to to go through all the evidence and to reach a  
16 unanimous verdict. Of course, the jury is welcome to come back  
17 on Monday morning. We will be in Monday morning presumably at  
18 9:30. I'm not exactly sure when the jury will get the case,  
19 and the jury will take whatever time it needs to reach a  
20 unanimous verdict. You are not deliberating yet, once again,  
21 but hopefully you will be tomorrow.

22 Have a good night everybody. Leave your pads on your  
23 chairs. We will see you tomorrow morning at 9:30. Good night.

24 (Jury not present)

25 THE COURT: Mr. Cook, do you have any more or are you

1 finished?

2 MR. COOK: I do, your Honor. That seemed to be a  
3 convenient stopping point.

4 THE COURT: Do you know how much longer?

5 MR. COOK: Less than 45 minutes.

6 THE COURT: All right. Then the government's  
7 rebuttal, Ms. Mermelstein, are you going to be doing that?

8 MS. MERMELSTEIN: I am, your Honor. I don't really  
9 know how to predict, to be honest, because I haven't written  
10 it. Perhaps I'll have a better sense in the morning.

11 THE COURT: Then I'll go directly to the jury  
12 instructions. We'll have the verdict form, which is the same  
13 as the draft except that we are switching the words as we  
14 discussed. Otherwise, it will be the same. It could be 11:30  
15 or 12:00 when it goes to the jury. We will have lunch brought  
16 in, then we'll let them go at 2:00 as we discussed.

17 Anything anybody wanted to address?

18 MS. KRAMER: No, your Honor.

19 MR. BOXER: No, your Honor.

20 MR. COOK: No, your Honor.

21 THE COURT: Have a good night. We are adjourned.

22 (Adjourned to 9:30 a.m., March 8, 2019)  
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